(12)

No. 96-1671-ADX Title: Franklin D. Raines, Director, Office of Management and Budget, et al., Appellants
v.
Robert C. Byrd, et al.

Docketed:
April 18, 1997 Court: United States District Court
for the District of Columbia

Entry	Date	Proceedings and Orders
	Apr 16 1997	Motion of Solicitor General and appellees to expedite consideration of the appeal and to establish expedited briefing and argument schedule if probable jurisdiction is noted filed.
	Apr 18 1997	Statement as to jurisdiction filed. (Response due May 18, 1997)
	Apr 21 1997	Memorandum of appellees Robert C. Byrd, et al. in response filed.
	Apr 21 1997	DISTRIBUTED. April 23, 1997
	Apr 23 1997	Motion of Solicitor General and appellees to expedite consideration of the appeal and to establish expedited briefing and argument schedule GRANTED.
	Apr 23 1997	PROBABLE JURISDICTION NOTED. The parties' briefs are to be filed with the Clerk of this Court and served upon opposing counsel on or before 3p.m., Friday, May 9, 1997. Reply briefs, if any, may be filed with the Clerk of this Court and served upon opposing counsel on or before 3 p.m., Wednesday, May 21, 1997. Briefs may be submitted in compliance with Rule 33.2 to be replaced as soon as possible with briefs prepared under Rule 33.1. Rule 29.2 does not apply. Oral argument is set for Tuesday, May 27, 1997.
		**********
	May 9 1997	Brief amicus curiae of American Petroleum Institute in support of neither party filed.
	May 9 1997	Brief amicus curiae of Association of the Bar of the City of New York for appellees filed.
	May 9 1997	Brief amici curiae of United States Senate, et al. in support of reversal filed.
	May 9 1997	Joint appendix filed.
	May 9 1997	Brief of appellants Franklin Raines, et al. filed.
	May 9 1997	Brief of appellees Robert C. Byrd, et al. filed.
	May 9 1997	Brief amici curiae of David Schoenbrod and Marci Hamilton filed.
	May 9 1997	Record filed.
	May 21 1997	Reply brief of appellants Franklin Raines, et al. filed.
	May 21 1997	Reply brief of appellees Robert C. Byrd, et al. filed.
	May 22 1997	Letter from counsel for the appellees received and distributed.
	May 27 1997	ARGUED.
	Jun 26 1997	Adjudged to be VACATED and REMANDED Rehnquist, C. J., delivered the opinion of the Court, in which O'Connor, Scalia, Kennedy, Thomas, and Ginsburg, JJ., joined. Souter, J., filed an opinion concurring in the judgment, in which Ginsburg, J., joined. Stevens, J., and Breyer,

2 pp

No. 96-1671-ADX

Entry	Date	Proceedings and Orders
		J., filed dissenting opinions.
	Jul 25 1997	JUDGMENT ISSUED.

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FILED

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL., APPELLANTS

v.

ROBERT C. BYRD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (to be codified at 2 U.S.C. 691 *et seq.*), gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The questions presented are as follows:

1. Whether individual Members of Congress have standing to challenge the constitutionality of the Act.

2. Whether the Act violates Article I of the Constitution.

PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are Franklin D. Raines, the Director of the Office of Management and Budget, and Robert E. Rubin, the Secretary of the Treasury. The appellees here, who were the plaintiffs below, are Senator Robert C. Byrd, Senator Daniel Patrick Moynihan, Senator Carl Levin, former Senator Mark O. Hatfield, Representative David E. Skaggs, and Representative Henry A. Waxman.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	3
The questions presented are substantial	12
Conclusion	27
Appendix A	1a
Appendix B	30a
Appendix C	32a

TABLE OF AUTHORITIES

Cases:

Allen v. *Wright*, 468 U.S. 737 (1984)	13, 18
American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946)	21
Bender v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986)	18
Bennett v. *Spear*, No. 95-813 (Mar. 19, 1997)	13
Buckley v. *Valeo*, 424 U.S. 1 (1976)	18
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983)	14
City of New Haven v. *United States*:	
634 F. Supp. 1449 (D.D.C. 1986), aff'd, 809 F.2d 900 (D.C. Cir. 1987)	4
809 F.2d 900 (D.C. Cir. 1987)	5
FEA v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976)	21
FPC v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)	21, 23
Field v. *Clark*, 143 U.S. 649 (1892)	21
Flast v. *Cohen*, 392 U.S. 83 (1968)	19
Hunt v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)	17
INS v. *Chadha*, 462 U.S. 919 (1983)	5, 24, 25
J.W. Hampton, Jr., & Co. v. *United States*, 276 U.S. 394 (1928)	21, 22
Laird v. *Tatum*, 408 U.S. 1 (1972)	18

Cases—Continued: Page

Lichter v. *United States*, 334 U.S. 742 (1948) 21, 23
Lincoln v. *Vigil*, 508 U.S. 182 (1993) 4, 23
Loving v. *United States*, 116 S. Ct. 1737 (1996) 20, 22, 26
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 13, 14, 16, 18
Mistretta v. *United States*, 488 U.S. 361 (1989) 20, 21, 22
Moore v. *U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985) 17, 19
Muskrat v. *United States*, 219 U.S. 346 (1911) 19
NBC v. *United States*, 319 U.S. 190 (1943) 21, 22
National Treasury Employees Union v. *United States*, 101 F.3d 1423 (D.C. Cir. 1996) 7
New York Central Securities Corp. v. *United States*, 287 U.S. 12 (1932) 21, 23
OPM v. *Richmond*, 496 U.S. 414 (1990) 23
Reno v. *Catholic Social Servs., Inc.*, 509 U.S. 43 (1993) 14
Sierra Club v. *Morton*, 405 U.S. 727 (1972) 13
Skinner v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989) 21
Synar v. *United States*, 626 F. Supp. 1374 (D.D.C.), aff'd *sub nom. Bowsher* v. *Synar*, 478 U.S. 714 (1986) 21
Touby v. *United States*, 500 U.S. 160 (1991) 20, 21
Train v. *City of New York*, 420 U.S. 35 (1975) 4, 16, 21
United States v. *Richardson*, 418 U.S. 166 (1974) .. 16
United States Nat'l Bank of Oregon v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439 (1993) 15
Whitmore v. *Arkansas*, 495 U.S. 149 (1990) 9, 12, 14
Yakus v. *United States*, 321 U.S. 414 (1944) 21, 23

Constitution and statutes: Page

U.S. Const.:
Art. I 12, 20, 21, 25, 26
§ 7, Cl. 2 (Presentment Clause) 2, 3, 10, 25
§ 9, Cl. 7 23
Art. II, § 3 18
Art. III 10, 12, 15, 17, 18
Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95 3
Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190 3
Act of Mar. 3, 1809, ch. 28, §§ 1-2, 2 Stat. 535-536 4
Act of May 1, 1820, ch. 52, § 5, 3 Stat. 568 4
Act of Aug. 26, 1842, ch. 202, § 23, 5 Stat. 533 4
Act of Feb. 12, 1868, ch. 8, § 2, 15 Stat. 36 4
Act of Sept. 29, 1987, Pub. L. No. 100-119, § 206(a), 101 Stat. 785-786 5
Impoundment Control Act of 1974, Pub. L. No. 93-344, Tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. 681 *et seq.*) 4
§ 1011(1), 2 U.S.C. 682(1) 4
§ 1011(3), 2 U.S.C. 682(3) 4
§ 1012, 2 U.S.C. 683 (1982) 5
§ 1013, 2 U.S.C. 684 (1982) 5
§ 1021(a), 2 U.S.C. 691(a) 5, 22, 23
§ 1021(a)(A), 2 U.S.C. 691(a)(A) 7, 24
§ 1021(a)(B), 2 U.S.C. 691(a)(B) 7
§ 1021(c), 2 U.S.C. 691(c) 7
§ 1022(b), 2 U.S.C. 691a(b) 24
§ 1023(a), 2 U.S.C. 691b(a) 7
§ 1023(b), 2 U.S.C. 691b(b) 6
§ 1024, 2 U.S.C. 691c 6
§ 1024(a), 2 U.S.C. 691c(a) 6
§ 1024(b), 2 U.S.C. 691c(b) 6
§ 1025, 2 U.S.C. 691d 7
§ 1026(4)(A), 2 U.S.C. 691e(4)(A) 6
§ 1026(4)(B), 2 U.S.C. 691e(4)(B) 6
§ 1026(4)(C), 2 U.S.C. 691e(4)(C) 6
§ 1026(6), 2 U.S.C. 691e(6) 7
§ 1026(7), 2 U.S.C. 691e(7) 6
§ 1026(8), 2 U.S.C. 691e(8) 6
§ 1026(9), 2 U.S.C. 691e(9) 6

Statutes—Continued: Page

Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (to be codified at 2 U.S.C. 691 *et seq.*) 2, 3
§ 2, 110 Stat. 1200-1211 (2 U.S.C. 691-691f) 5
§ 3(a)(1), 110 Stat. 1211 (2 U.S.C. 692(a)(1)) 9
§ 3(c), 110 Stat. 1211 (2 U.S.C. 692(c)) 9

Miscellaneous:

89 Cong. Rec. 10,362 (1943) 3
Correspondence of the Justices, *reprinted in* 3 *The Correspondence and Public Papers of John Jay* (H. Johnston ed. 1891) 19
H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. (1996) 23
H.R. Rep. No. 1797, 81st Cong., 2d Sess. (1950) 3

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-29a) is not yet reported.

JURISDICTION

The order of the district court was entered on April 10, 1997. A notice of appeal (App., *infra*, 30a-31a) was filed on April 11, 1997. The jurisdiction of this Court is invoked under Pub. L. No. 104-130, § 3(b), 110 Stat. 1211 (App., *infra*, 57a) (to be codified at 2 U.S.C. 692(b)).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Presentment Clause of the United States Constitution, Art. 1, § 7, Cl. 2, provides as follows:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

2. The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (to be codified at 2 U.S.C. 691 *et seq.*), is reproduced at App., *infra*, 32a-59a.

STATEMENT

This case involves a challenge to the constitutionality of the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (to be codified at 2 U.S.C. 691 *et seq.*). Although the authority vested in the President by the Line Item Veto Act has never been exercised, the district court permitted several Members of Congress to proceed with a constitutional challenge to the Act. On the merits, the court concluded that the Act authorizes the President to "repeal" Acts of Congress, in violation of the Presentment Clause, U.S. Const. Art. I, § 7, Cl. 2, and is therefore unconstitutional. Congress has vested this Court with immediate appellate jurisdiction over the district court's decision. App., *infra*, 57a.

1. Beginning in 1789, and continuing into the Nineteenth and Twentieth Centuries, Congress established the basic practice of passing appropriations laws that provide for expenditures "not exceeding" specified amounts. See, *e.g.*, Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95; Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190. By appropriating funds "not exceeding" fixed amounts, Congress left the Executive Branch with discretion to spend less than the appropriated amount if the full measure of the appropriation proved unnecessary. See, *e.g.*, H.R. Rep. No. 1797, 81st Cong., 2d Sess. 9 (1950) ("Appropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity."); 89 Cong. Rec. 10,362 (1943) (Sen. Truman) ("When the Congress appropriates funds * * * none of us hold[s] that we give a mandate to expend the funds appropriated."). In addition, from an early date, Congress conferred further discretion over spending by authoriz-

ing the transfer of appropriated funds within departments of the Executive Branch. See, *e.g.*, Act of Mar. 3, 1809, ch. 28, §§ 1-2, 2 Stat. 535-536; Act of May 1, 1820, ch. 52, § 5, 3 Stat. 568; Act of Aug. 26, 1842, ch. 202, § 23, 5 Stat. 533; Act of Feb. 12, 1868, ch. 8, § 2, 15 Stat. 36 (repealing transfer authority). Congress gives the Executive Branch similar discretion whenever it passes "lump-sum" appropriations bills. See *Lincoln* v. *Vigil*, 508 U.S. 182, 191-192 (1993).

During the early 1970s, the Nixon Administration attempted to assert broad Executive Branch control over spending by impounding funds that had been appropriated for a wide variety of federal programs. That effort led to a series of lawsuits challenging various impoundments. See *City of New Haven* v. *United States*, 634 F. Supp. 1449, 1454-1455 (D.D.C. 1986) (summarizing cases), aff'd, 809 F.2d 900 (D.C. Cir. 1987). The courts resolved those disputes by construing the applicable appropriations statutes to determine whether Congress intended for the President to have discretion whether or not to expend the impounded funds. See, *e.g.*, *Train* v. *City of New York*, 420 U.S. 35, 44-46 (1975).

In response to the impoundment controversy, Congress enacted the Impoundment Control Act of 1974 (ICA), Pub. L. No. 93-344, Tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. 681 *et seq.*). The Impoundment Control Act distinguishes between two forms of impoundment: deferrals (delays in spending during the course of a fiscal year) and rescissions (permanent withholding of appropriated funds). See 2 U.S.C. 682(1) and (3). The Act authorized the President to engage in deferrals but made that authority subject

to a one-House legislative veto. 2 U.S.C. 684 (1982).[1] The Act prohibited the President from engaging in unilateral rescissions. Instead, it authorized the President to propose rescissions to Congress under a mechanism for expedited legislative consideration. 2 U.S.C. 683 (1982).

2. The Line Item Veto Act, enacted in April 1996 as an amendment to the Impoundment Control Act, is designed to enhance the limited rescission authority provided in that Act. Once a bill or joint resolution "has been signed into law pursuant to Article I, section 7, of the Constitution of the United States," the Line Item Veto Act gives the President the authority to "cancel in whole" specific spending and revenue items contained in that law. ICA § 1021(a) (2 U.S.C. 691(a)); App., *infra*, 32a.[2]

The President's authority under the Act extends to three budgetary categories: "dollar amount[s] of discretionary budget authority," "item[s] of new direct spending," and "limited tax benefit[s]." ICA § 1021(a) (2 U.S.C. 691(a)); App., *infra*, 32a-33a. A "dollar amount of discretionary budget authority" is the entire amount specified for one purpose in an appropriations law, accompanying committee report or state-

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[1] This Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983), made clear that the Impoundment Control Act's legislative veto provision was unconstitutional. See *City of New Haven* v. *United States*, 809 F.2d 900, 905 (D.C. Cir. 1987) (government conceded unconstitutionality of Section 684's legislative veto provision). Congress subsequently amended the Act to eliminate that provision. Act of Sept. 29, 1987, Pub. L. No. 100-119, § 206(a), 101 Stat. 785-786.

[2] Section 2 of the Line Item Veto Act added a new Part C to the Impoundment Control Act. The citations in the text to "ICA §" are to Sections of that new Part C.

ment of managers, or authorizing law. ICA § 1026(7) (2 U.S.C. 691e(7)); App., *infra*, 50a-51a. An "item of new direct spending" is a specific provision that will result in "an increase in budget authority or outlays" for entitlements, food stamps, or other programs funded other than through annual appropriations. ICA § 1026(8) (2 U.S.C. 691e(8)); App., *infra*, 51a. A "limited tax benefit" is a revenue-losing provision that gives a tax reduction to 100 or fewer beneficiaries, or a provision that provides "temporary or permanent transitional relief" to ten or fewer beneficiaries. ICA § 1026(9) (2 U.S.C. 691e(9)); App., *infra*, 52a-54a.

Cancellation of a dollar amount of discretionary budget authority operates to rescind that authority. ICA § 1026(4)(A) (2 U.S.C. 691e(4)(A)); App., *infra*, 48a. Cancellation of an item of new direct spending or a limited tax benefit prevents the cancelled spending or revenue provision from having "legal force or effect." ICA § 1026(4)(B) and (C) (2 U.S.C. 691e(4)(B) and (C)); App., *infra*, 48a-49a. The President may not use cancelled funds for any purpose other than deficit reduction. ICA §§ 1023(b), 1024 (2 U.S.C. 691b(b), 691c); App., *infra*, 36a-39a. Deficit reduction is accomplished through a statutory "lockbox" procedure, under which the Office of Management and Budget (OMB) must calculate the deficit reduction from the cancellation and "lock in" the savings by adjusting the calculations submitted to Congress under the Gramm-Rudman-Hollings Act. ICA § 1024(a) and (b) (2 U.S.C. 691c(a) and (b)); App., *infra*, 37a-38a.

The President is authorized to cancel an item if he determines that doing so will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national

interest." ICA § 1021(a)(A) (2 U.S.C. 691(a)(A)); App., *infra*, 33a. The President must notify Congress of any cancellation within five calendar days after the enactment of the law providing the item that is being cancelled. ICA § 1021(a)(B) (2 U.S.C. 691(a)(B)); App., *infra*, 33a.

A cancellation under the Act takes effect upon Congress's receipt of the President's notification. ICA § 1023(a) (2 U.S.C. 691b(a)); App., *infra*, 36a. The Act provides for highly expedited consideration by each House of Congress of a bill to set aside a cancellation after receipt of the President's notification. ICA §§ 1025, 1026(6) (2 U.S.C. 691d, 691e(6)); App., *infra*, 39a-47a, 49a-50a. If a disapproval bill is enacted into law, all disapproved cancellations become null and void and the cancelled items become effective. ICA § 1023(a) (2 U.S.C. 691b(a)); App., *infra*, 36a. A disapproval bill, if it becomes law, is not subject to the President's cancellation authority under the Act. ICA § 1021(c) (2 U.S.C. 691(c)); App., *infra*, 34a.

3. The Line Item Veto Act took effect on January 1, 1997. See App., *infra*, 2a, 58a-59a. Appellees—six Members of Congress, one of whom has since left office—filed suit the following day.[3] They named as defendants Franklin D. Raines, the Director of OMB, and Robert E. Rubin, the Secretary of the Treasury. Complaint at 1; see App., *infra*, 2a.[4] Appel-

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[3] A similar constitutional challenge was brought by a federal labor union immediately after the Act was signed into law in April 1996. That action was dismissed on standing and ripeness grounds. See *National Treasury Employees Union* v. *United States*, 101 F.3d 1423 (D.C. Cir. 1996).

[4] Appellees alleged that "defendant Raines is responsible for executing the President's cancellations of budgetary and spending authority under the Act," and that "defendant Rubin

lees alleged that "the Act confers on the President powers of veto, revision, and repeal of federal law that violate Article I of the Constitution." Complaint at 2 (¶ 1). They further alleged that

> [t]he Act directly and concretely injures [appellees], in their official capacities, by (a) altering the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divesting [appellees] of their constitutional role in the repeal of legislation, and (c) altering the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress.

Id. at 4-5 (¶ 14). The complaint did not allege that the President had exercised his cancellation authority under the Act.

4. The district court denied the government's motion to dismiss the complaint and entered summary judgment in favor of appellees. App., *infra*, 1a-29a.

a. The district court first held that appellees had standing to bring their suit. App., *infra*, 9a-12a. The court relied on prior D.C. Circuit decisions holding that Members of Congress have "standing to challenge measures that affect their constitutionally prescribed lawmaking powers," although it recognized that "the Supreme Court has never endorsed

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is responsible for executing the President's cancellations of 'limited tax benefits' under the Act and for executing and enforcing the tax laws of the United States." Complaint at 3-4 (¶¶ 11-12).

the Circuit's analysis of standing in such cases." *Id.* at 10a-11a. Applying those circuit precedents, the district court held that "[appellees'] claim of injury in this case, namely, that the Act dilutes their Article I voting power, is likewise of the kind that suffices to confer standing under Article III." *Id.* at 11a. By virtue of the Act, the court explained, "[appellees'] votes mean something different from what they meant before, for good or ill, and [appellees] who perceive it as the latter are thus 'injured' in a constitutional sense whenever an appropriations bill comes up for a vote, whatever the President ultimately does with it." *Id.* at 11a-12a.

The district court also held that appellees' claims were ripe for adjudication despite the fact that the President had not yet exercised any cancellation authority under the Act. App., *infra*, 12a-15a. The court explained that, "[b]ecause [appellees] now find themselves in a position of unanticipated and unwelcome subservience to the President before and after they vote on appropriations bills, Article III is satisfied." *Id.* at 14a. The court noted as well that "the budgetary process is already underway," and that "appropriations votes are inevitable, and 'certainly impending.'" *Ibid.* (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)).[5]

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[5] Section 3(a)(1) of the Line Item Veto Act expressly authorizes suits by Members of Congress challenging the constitutionality of any provision of the Act. App., *infra*, 56a (2 U.S.C. 692(a)(1)). Section 3(c) of the Act directs both the district court and this Court to expedite disposition of such suits "to the greatest possible extent." *Id.* at 57a (2 U.S.C. 692(c)). The district court construed those provisions as rendering inapplicable any prudential constraints on the court's

b. On the merits, the district court concluded that the Line Item Veto Act is unconstitutional. App., *infra*, 16a-29a. The court first observed that, under the Presentment Clause, U.S. Const. Art. I, § 7, Cl. 2, the President must approve or disapprove *in toto* any bill passed by both Houses of Congress. App., *infra*, 18a. The court acknowledged that any appropriations law whose provisions are subject to cancellation under the Act "will have been 'approved' in accordance with the Presentment Clause." *Id.* at 20a. The court concluded, however, that, "following approval [of an appropriations bill], a cancellation by the President is a legislative repeal that itself must comply with Presentment Clause procedures." *Ibid.* The court reasoned:

> Where the President signs a bill but then purports to cancel parts of it, he exceeds his constitutional authority and prevents both Houses of Congress from participating in the exercise of lawmaking authority. The President's cancellation of an item unilaterally effects a repeal of statutory law such that the bill he signed is not the law that will govern the Nation. That is precisely what the Presentment Clause was designed to prevent.

Id. at 21a-22a.

The district court also acknowledged that the President may be vested with discretionary authority to impound, or to decline to spend, funds previously appropriated by Congress. App., *infra*, 22a-23a. Appellants contended that the President's cancellation

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exercise of jurisdiction, leaving only the requirements of Article III. See *id.* at 9a n.5, 14a n.8, 16a.

authority under the Act is simply a form of prospective impoundment authority, one that makes individual spending items in an appropriations law discretionary rather than mandatory for a limited period following the law's enactment. The district court rejected that argument, stating that cancellation under the Act "is simply not the same thing as impoundment," but instead "is equivalent to repeal" of the underlying appropriations law. *Id.* at 24a-25a. The court explained:

> Cancellation forever renders a provision of federal law without legal force or effect, so the President who canceled an item and his successors must turn to Congress to reauthorize the foregone spending. Whereas delegated authority to impound is exercised from time to time, in light of changed circumstances or shifting executive (or legislative) priorities, cancellation occurs immediately and irreversibly.

Id. at 25a. The court also sought to distinguish the Line Item Veto Act from statutes previously upheld by this Court on the ground that, in its view, the Act "hands off to the President authority over fundamental legislative choices" and "spares Congress the burden of making those vexing choices of which programs to preserve and which to cut." *Id.* at 27a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The district erred both in holding that appellees' objections to the Line Item Veto Act are justiciable in an Article III court and in declaring the Act to be unconstitutional. Members of Congress have no judicially cognizable interest in the operation or the outcome of the legislative process. Judicial intervention is particularly unwarranted where, as here, the President has yet to take any action that is claimed to offend Article I. Appellees' request for a declaration by the district court that the Act is unconstitutional is not a "Case" or "Controversy" within the meaning of Article III; it is a classic request for an advisory opinion.

If the Court were nevertheless to find this case justiciable, the judgment of the district court should be set aside on the merits. Contrary to the district court's holding, the Line Item Veto Act does not authorize the President to "repeal" any portion of a validly enacted federal law. Rather, the Act is simply the latest exercise of Congress's long-standing and well-settled power to vest the Executive Branch with discretion over the expenditure of appropriated funds.

1. Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990).

> To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is

> "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

Bennett v. *Spear*, No. 95-813 (Mar. 19, 1997), slip op. 6.

"[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). "This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Id.* at 754. The "require[ment] that the party seeking review be himself among the injured," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972)), ensures that the federal courts are confined to determining "the rights of individuals" and do not usurp the role of the political branches in "[v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws)," *id.* at 576.

The complaint in this case alleges that

> [t]he Act directly and concretely injures [appellees], in their official capacities, by (a) altering the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divesting [appellees] of their constitutional role in the repeal of legislation, and (c) altering the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress.

Complaint at 4-5 (¶ 14). For two reasons, appellees' asserted injuries are insufficient to satisfy the case or controversy requirement.

a. This Court has emphasized that "[a]llegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact." *Whitmore*, 495 U.S. at 158 (internal quotation marks omitted); accord, *e.g.*, *Defenders of Wildlife*, 504 U.S. at 564 & n.2.[6] The gravamen of appellees' suit is that the President will, in the future, employ the authority conferred by the Line Item Veto Act so as to effect what they characterize as a partial "repeal" of appropriations laws enacted by Congress. Even if Members of Congress possessed a judicially cognizable interest in the proper administration of federal law, appellees' claims would be far too speculative to provide a basis for federal jurisdiction.

At the present time, it remains unclear when the President will invoke the cancellation authority contained in the Line Item Veto Act; what items of spending, or limited tax benefits, he will choose to cancel; and whether th se items will be reenacted into law through a disapproval bill. It is, in particular, unclear when or whether legislative measures supported by appellees themselves will be cancelled pursuant to the Act's procedures. Thus, even if a

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[6] The requirement that a plaintiff's injury be "actual or imminent, not 'conjectural' or 'hypothetical,'" *Whitmore*, 495 U.S. at 155 (quoting *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983)), is closely related to the requirement that the claim be "ripe" for adjudication. Cf. *Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) (noting that "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction").

Member of Congress could be said to suffer a judicially cognizable injury through the frustration of his own legislative preferences, no such injury is either present or imminent in the instant case.[7]

b. Even if this suit had been brought as a challenge to an actual exercise of the President's cancellation authority, appellees would lack standing. This Court has

> consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution

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[7] In explaining its contrary conclusion, the district court stated that, "[b]ecause [appellees] now find themselves in a position of unanticipated and unwelcome subservience to the President before and after they vote on appropriations bills, Article III is satisfied." App., *infra*, 14a; see also *id.* at 12a ("Under the Act the dynamic of lawmaking is fundamentally altered. Compromises and trade-offs by individual lawmakers must take into account the President's item-by-item cancellation power looming over the end product."). Appellees are free, however, to vote and to participate in legislative negotiations on the basis of their own stated conviction that the Act is unconstitutional and that any exercise of the President's cancellation authority will therefore be a legal nullity. No alteration in "the dynamic of lawmaking" is *compelled* by the Line Item Veto Act. Rather, any such change will result from the fact that other participants in the legislative process do not share appellees' view that the Act is constitutionally deficient. Legislative deliberations frequently take place, however, against a backdrop of substantial disagreement or uncertainty regarding the existing state of the law. Article III's proscription on the issuance of advisory opinions by the federal courts, see, *e.g.*, *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446 (1993), may not be evaded by characterizing that uncertainty as a current injury to Members of Congress. See page 19, *infra*.

> and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Defenders of Wildlife, 504 U.S. at 573-574. A private plaintiff could, of course, establish the existence of a case or controversy by demonstrating that the cancellation of a particular budget item (or limited tax benefit) would adversely affect his own economic interests. See, *e.g.*, *Train* v. *City of New York*, 420 U.S. 35, 40 (1975). A member of the public could not, however, obtain judicial review of an exercise of the President's cancellation authority merely by alleging that the cancellation had improperly negated the vote of his own Senator or Representative; that it had subverted the will of Congress; or that it had impermissibly shifted the balance of power between the Legislative and Executive Branches. Any such allegation would present a "generalized grievance" plainly insusceptible of judicial resolution. *United States* v. *Richardson*, 418 U.S. 166, 171 (1974).

Appellees' claim to standing thus rests on the premise that a Member of Congress has a judicially cognizable interest in the proper performance of his legislative duties, in the execution of an Act of Congress, or in the maintenance of the constitutionally prescribed balance of power between the President and Congress, even though his constituents possess no such interest. That premise is contrary to first principles of representative democracy. As then-Judge Scalia explained,

> no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a

> judicially cognizable private interest. They wield those powers not as private citizens but only through the public office which they hold. Whatever the realities of private ambition and vainglory may be, in contemplation of law their personal interest in full and unfettered exercise of their authority is no greater than that of all the citizens for whose benefit (and not for the personal benefit of the officeholder) the authority has been conferred.

Moore v. *U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result), cert. denied, 469 U.S. 1106 (1985). Because Members of Congress exercise their powers as representatives and servants of the people, any impairment of their legislative functions causes them no injury that is not shared by the public generally. Cf. *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (association's standing to sue on behalf of its members requires, *inter alia*, that "its members would otherwise have standing to sue in their own right").[8]

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[8] This is not to say that impairment of effective governance can never give rise to the sort of "injury" that is redressable by an Article III court. An Executive Branch official who is authorized to conduct litigation *on behalf of the government* can assuredly file suit, or appeal adverse rulings, to vindicate the governmental and public interest in the effective administration of federal law. That is quite different, however, from the proposition that an individual official himself suffers a judicially cognizable injury through the impairment of governmental functions.

Any claim to standing of an individual Member of Congress is thus subject to two distinct objections. First, litigation on behalf of the United States is entrusted to the Executive rather

A holding that an individual Member has a personal interest in the operation or outcome of the legislative process that can be vindicated by an Article III court would also subvert the separation of powers principles that the case or controversy requirement is intended to serve. That requirement ensures that the Judicial Branch does not exercise a general superintendence over the workings of the federal government. See *Allen*, 468 U.S. at 760 (explaining that abandonment of standing requirements "would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action") (quoting *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972)). Rather, the federal courts are to resolve constitutional and other legal issues only in the course of determining "the rights of individuals." *Defenders of Wildlife*, 504 U.S. at 576. To hold that a Member's interest in the proper operation of the legislative process is itself an indi-

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than the Legislative Branch. The "discretionary power to seek judicial relief" is "authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam) (quoting U.S. Const. Art. II, § 3). Second, a suit brought by an individual Member cannot properly be characterized as one filed on behalf of Congress (let alone the United States), particularly where (as here) the suit attacks the constitutionality of a federal statute. Cf. *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 (1986) (appellant's status as member of school board "does not permit him to 'step into the shoes of the Board' and invoke its right to appeal"; "[g]enerally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take").

vidual right would effectively negate that limitation. See *Moore*, 733 F.2d at 959 (Scalia, J., concurring in result).

The terms "Cases" and "Controversies" were intended by the Framers to confine the federal courts to resolving those disputes that "are traditionally thought to be capable of resolution through the judicial process." *Flast* v. *Cohen*, 392 U.S. 83, 97 (1968). The personal disagreement by individual Members of Congress with the considered judgment of the President and of Congress as a whole regarding the validity of an Act of Congress is plainly not within the traditional purview of the courts. Neither the President nor Congress (or its individual Members) could unilaterally obtain an advisory opinion from this Court or a lower federal court regarding the constitutionality of the Line Item Veto Act, even if the request for such an opinion was motivated by a desire to eliminate legal uncertainty about the manner in which they should exercise their respective powers and responsibilities. See Correspondence of the Justices, *reprinted in* 3 *The Correspondence and Public Papers of John Jay* 486-489 (H. Johnston ed. 1891); *Muskrat* v. *United States*, 219 U.S. 346, 354 (1911). That issue is no more suitable for judicial resolution in its present posture merely because several individual Members of Congress have written their request in the form of a complaint and named as defendants two officers of the other political Branch who happen to hold a contrary view of the constitutional question.[9]

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[9] It is, moreover, the President, not the Director of OMB or the Secretary of the Treasury, in whom the Act vests the power to cancel items of spending or limited tax benefits.

There is, finally, no principled limitation on the theory that Members of Congress have a judicially cognizable interest in the operation or outcome of the legislative process. Any contention that the President's conduct violates statutory requirements or prohibitions can be recast as a claim that the votes of Members of Congress have been nullified. Presidential action that is alleged to transgress the Constitution can frequently be characterized as shifting the balance between the Executive and Legislative Branches. And any statutory assignment of power to the President can be said to affect future interactions between the political Branches, since the President will have no incentive to negotiate for authority that he already possesses. The district court erred in recognizing such an unprecedented expansion of power in the federal courts.

2. The district court also erred in concluding that the Line Item Veto Act violates the Presentment Clause.

a. Although Article I of the Constitution vests "[a]ll legislative Powers" in Congress, it "do[es] not prevent Congress from obtaining the assistance of its coordinate Branches" in furtherance of its responsibilities. *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). Congress is therefore free to "leav[e] a certain degree of discretion to executive or judicial actors" in the execution of federal laws. *Touby* v. *United States*, 500 U.S. 160, 165 (1991). This Court has repeatedly sustained the constitutionality of laws that vest the Executive Branch with discretion over the implementation of federal statutes and programs, notwithstanding claims that Congress had impermissibly "delegated" its legislative powers. See, *e.g.*, *Loving* v. *United States*, 116 S. Ct. 1737 (1996); *Touby*,

supra; *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Mistretta*, *supra*; *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *Lichter* v. *United States*, 334 U.S. 742, 785 (1948); *American Power & Light Co.* v. *SEC*, 329 U.S. 90 (1946); *Yakus* v. *United States*, 321 U.S. 414 (1944); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *NBC* v. *United States*, 319 U.S. 190 (1943); *New York Central Securities Corp.* v. *United States*, 287 U.S. 12 (1932); *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394 (1928); *Field* v. *Clark*, 143 U.S. 649 (1892); *Synar* v. *United States*, 626 F. Supp. 1374, 1383-1384 & n.9 (D.D.C.) (per curiam) (three-judge court) (citing cases), aff'd *sub nom. Bowsher* v. *Synar*, 478 U.S. 714 (1986).

As we have explained above, Executive Branch discretion has long been an integral part of Congress's exercise of its spending powers under Article I. See pages 3-4, *supra*. Although the withholding of appropriated funds has frequently engendered litigation, the point of dispute invariably has been one of statutory construction—*i.e.*, whether Congress in fact gave the Executive Branch authority to withhold the contested funds. See, *e.g.*, *Train*, 420 U.S. at 44-46. The political Branches and the courts have shared the assumption that Congress is free to confer that authority if it wishes to do so.

The Line Item Veto Act is simply the latest chapter in Congress's efforts to enlist the Executive Branch's assistance in controlling spending by giving the President discretionary authority over federal expenditures. By virtue of the Act, the President may decline to give effect to specified spending and revenue items in a federal law, during a brief period following the law's enactment, if the President determines that cancelling a particular item will "reduce

the Federal budget deficit," will not "impair any essential Government functions," and will not "harm the national interest." ICA § 1021(a)(A) (2 U.S.C. 691(a)(A)); App., *infra*, 33a. The Act operates to make the specified spending and revenue items discretionary, rather than mandatory, where the President finds that the Act's criteria have been met. For purposes of Article I, the Line Item Veto Act is no different from any other federal statute that gives the President discretion to decide whether or not to expend funds that have been appropriated by Congress.

b. When Congress vests the Executive Branch with discretion over the implementation of federal laws, the nondelegation doctrine generally provides the constitutional standards that govern the permissible scope of the Executive Branch's role. The touchstone of the nondelegation doctrine is whether Congress has provided an "intelligible principle" by which the executive discretion may be exercised. *Mistretta*, 488 U.S. at 372; *J.W. Hampton*, 276 U.S. at 406. This Court "has deemed it constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority." *Mistretta*, 488 U.S. at 372-373 (internal quotation marks omitted). Under that approach, the Court has frequently "upheld * * * delegations under standards phrased in sweeping terms." *Loving*, 116 S. Ct. at 1750.[10]

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[10] For example, the Court has sustained the constitutionality of statutes giving the Executive Branch the authority to regulate broadcast licensing as required by "public interest, convenience, or necessity" (*NBC*, 319 U.S. at 194, 225-226); to

The Line Item Veto Act places constitutionally sufficient constraints on the President's exercise of discretion over federal spending.[11] To begin with, the Act permits the President to cancel items only "in whole" (ICA § 1021(a) (2 U.S.C. 691(a)); App., *infra*, 32a), not in part, thereby requiring him to make "an all or nothing decision." H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 33 (1996). And because the Act's

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approve consolidation of carriers "in the public interest" (*New York Central Securities Corp.*, 287 U.S. at 16, 24); to recover "excessive profits" on military contracts (*Lichter*, 334 U.S. at 778-786); to fix prices that "will be generally fair and equitable and will effectuate the purposes" of the law (*Yakus*, 321 U.S. at 420, 426-427); and to determine "just and reasonable" natural gas rates (*Hope Natural Gas Co.*, 320 U.S. at 600-601).

[11] It is far from clear that congressional appropriations of money are subject to the nondelegation principles that generally apply to regulation of private conduct. This Court has observed that "certain categories of administrative decisions * * * traditionally have [been] regarded as 'committed to agency discretion.'" *Lincoln* v. *Vigil*, 508 U.S. 182, 191 (1993). "The allocation of funds from a lump-sum appropriation is" one such decision, since "a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions." *Id.* at 192 (internal quotation marks omitted). So long as the activities on which appropriated funds are spent are themselves authorized by statute, and so long as the Executive Branch adheres to the constitutional directive that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," Art. I, § 9, Cl. 7; see *OPM* v. *Richmond*, 496 U.S. 414, 424-425 (1990), we believe that no constitutional infirmity would exist even if an appropriations law placed no further constraints on Executive Branch discretion. Even if the nondelegation standard articulated in *Mistretta* is assumed to apply in this context, however, it is easily satisfied here.

"lockbox" feature (see page 6, *supra*) requires the President to devote any cancelled amounts to deficit reduction, the President has no authority to spend money on *any* project beyond the specific amount appropriated by Congress. The Act's requirement that each budgetary item must be devoted (in its entirety) either to a congressionally defined purpose or to deficit reduction is itself a substantial limitation on the President's discretion.

In addition, however, the Act provides meaningful guidance to the President in his choice between those two alternatives. The Act permits the President to cancel particular spending or revenue items only if he determines that the cancellation will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." ICA § 1021(a)(A) (2 U.S.C. 691(a)(A)); App., *infra*, 33a. The Act also requires the President to support any cancellation by providing Congress with, *inter alia*, the reasons for the cancellation; the estimated fiscal, economic, and budgetary effects of the cancellation; and the estimated effect of the cancellation upon the objects, purposes, and programs for which the cancelled authority was provided. ICA § 1022(b) (2 U.S.C. 691a(b)); App., *infra*, 34a-35a.

c. Thus, contrary to the district court's conclusion, the Line Item Veto Act does not authorize the President to exercise "legislative authority" or to "repeal" a law. App., *infra*, 24a, 25a. An Executive Branch official administering an Act of Congress "does not exercise 'legislative' power." *INS* v. *Chadha*, 462 U.S. 919, 953 n.16 (1983). "The bicameral process is not necessary as a check on the Executive's administration of the laws because his admin-

istrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7." *Ibid.* When an Executive Branch official declines to exercise discretionary spending authority conferred by statute, he does not thereby "repeal" that statute—he implements it according to its terms.[12]

The district court also sought to distinguish the Line Item Veto Act from statutes previously upheld by this Court on the ground that the Act "hands off to the President authority over fundamental legislative choices" and "spares Congress the burden of making those vexing choices of which programs to preserve and which to cut." App., *infra*, 27a. The precise import of those statements is unclear. If the court meant that the fashioning of budgetary priorities is an inherently legislative (and thus nondelegable) function, the court's analysis cannot be squared with Congress's consistent (and heretofore unquestioned) practice of authorizing the Executive Branch to exercise considerable discretion over the expenditure of appropriated funds. If the district court meant that the discretion conferred by the Line Item Veto Act is

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[12] The Presentment Clause and related provisions of Article I establish "a single, finely wrought and exhaustively considered, procedure" for the enactment of a law. *Chadha*, 462 U.S. at 951. It is, of course, undisputed that the Line Item Veto Act itself was enacted into law in conformity with that "finely wrought" procedure. It is equally clear that the Act does not exempt any other federal law from the requirements of the Presentment Clause. The President's cancellation authority comes into play only *after* the requirements of the Presentment Clause, including the President's approval of the presented bill, have been satisfied.

standardless or otherwise unduly broad, it was incorrect for the reasons stated at pages 23-24, *supra*.

Finally, no constitutional infirmity results from the fact that the President must exercise, or decline to exercise, his cancellation authority within the five-day period after enactment of an appropriations law. There is, in particular, no basis whatever for the district court's suggestion that this feature of the Line Item Veto Act effects a particularly "expansive * * * delegation[] of power." App., *infra*, 25a. To the contrary, the discretion thus conferred is quite plainly *narrower* than would be the case if the President were vested with continuing authority to revisit the question whether particular expenditures should be made.

* * * * *

This Court recently observed that "[s]eparation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes." *Loving*, 116 S. Ct. at 1751. The Act at issue here represents such an exercise in "measured cooperation." The district court's conclusion that the Act is at odds with Article I should be rejected.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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APRIL 1997

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

MEMORANDUM AND ORDER

[Filed: Apr. 10, 1997]

This action challenges the validity of legislation entitled the Line Item Veto Act, Pub. Law No. 104-130, 110 Stat. 1200 (1996) (to be codified at 2 U.S.C. §§ 681 note, 691 *et seq.*) ("the Act"), which empowers the President unilaterally to "cancel" certain appropriations and tax benefits after signing them into law. The Act represents an effort by Congress to enlist presidential assistance in controlling rampant federal spending by conferring upon the President what it termed a species of "enhanced rescission" power, expanding the authority he formerly possessed under the Impoundment Control Act of 1974. Plaintiffs, four

Senators and two Congressmen,[1] contend that the *mechanism* chosen by Congress to its desired end contravenes the text and purpose of Article I, section 7, clause 2, known as the "Presentment Clause" of the Constitution. Rather than making expenditures of federal funds appropriated by Congress matters of presidential discretion, the Act effectively permits the President to repeal duly enacted provisions of federal law. This he cannot do. Accordingly, the Court will grant plaintiffs' motion for summary judgment, deny defendants' motion, and declare the Act unconstitutional.

I.

Operation of the Line Item Veto Act

Following years of importuning by successive Presidents and vacillation by earlier Congresses, President Clinton approved the Line Item Veto Act as passed by the 104th Congress on April 9, 1996. Immediately after it became effective on January 1, 1997, the plaintiff Senators and Congressmen filed this action to declare it void. Named defendants are the Director of the Office of Management and Budget and the Secretary of the Treasury—the officials alleged, respectively, to be responsible for executing the President's "cancellations" of spending items and limited tax benefits under the Act. The United States Senate and the Bipartisan Legal Advisory Group of the United States House of Representatives

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[1] Senators Robert C. Byrd, Daniel Patrick Moynihan, Carl Levin, and Mark O. Hatfield, and Representatives David E. Skaggs and Henry A. Waxman. All but Senator Hatfield are currently sitting Members of the 105th Congress.

have appeared jointly as *amici curiae* to defend the constitutionality of the Act.

The Act, which sunsets on January 1, 2005, allows the President, after signing a bill into law, to "cancel in whole"—

(1) any dollar amount of discretionary budget authority;
(2) any item of new direct spending; or
(3) any limited tax benefit.

2 U.S.C. § 691(a). "Dollar amounts of discretionary budget authority" include any dollar amount set forth in an appropriation law, including those to be found separately in tables, charts, or explanatory text of statements or committee reports accompanying legislation. 2 U.S.C. § 691e(7). Thus the President's cancellation power applies to legislative history as well as to statutory text itself. "Items of new direct spending" generally include "entitlement" payments to individuals or to state and local governments. 2 U.S.C. § 691e(8); H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. at 36 (1996). "Limited tax benefits" are those revenue-losing provisions that apply to 100 or fewer beneficiaries in any fiscal year, or tax provisions that provide temporary or permanent transitional relief for 10 or fewer beneficiaries from a change in the Internal Revenue Code. 2 U.S.C. § 691e(9). The Act directs the congressional Joint Committee on Taxation to identify limited tax benefits contained in bills and joint resolutions, and provides that those bills and resolutions may include a separate section in which identified tax benefits are not subject to cancellation. 2 U.S.C. § 691f(a) - (c).

The most critical definition is found in § 691e(4). The term "cancel" or "cancellation" means "to re-

scind" any dollar amount of discretionary budget authority or to prevent items of new direct spending or limited tax benefits "from having legal force or effect." *Id.*

To exercise the cancellation power the President must first determine that it will—

(i) reduce the Federal budget deficit;
(ii) not impair any essential Government functions; and
(iii) not harm the national interest.

2 U.S.C. § 691(a)(A). The President effects a cancellation by transmitting a "special message" to Congress within five calendar days (excluding Sundays) after enactment of the law containing the item(s) in question. 2 U.S.C. § 691(a)(B). The Act spells out the content requirements for a special message and provides that it shall be printed in the Federal Register. 2 U.S.C. § 691a.

Once an item has been canceled, no further action by Congress is required; cancellation takes effect upon Congress' receipt of the special message. 2 U.S.C. § 691b(a). Congress may thereafter introduce a "disapproval bill" to reenact any canceled items within five days of receiving the special message, and must pass it within 30 days.[2] 2 U.S.C. § 691d(b), (c)(1). The President can, of course, exercise a conventional veto of any disapproval bill, but Congress can then reinstate the *status quo ante* by overriding that veto.

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[2] The President has no authority to cancel items contained in an enacted disapproval bill; he must take it or leave it as presented to him.

Historical Background

The Act is best understood against the historical backdrop of the efforts of the President and Congress over the years to control government spending and, in more recent times, to reduce an ever-increasing federal budget deficit. It is a product of many years of inter-branch conflict and compromise over how to accomplish those goals. Since the outset of the 19th Century, American Presidents have labored to influence Congress' spending habits, and many have lobbied in particular for the authority to veto selected provisions of bills presented for their signature. *See* 12 Op. Off. Legal Counsel 128, 157-65 (1988). Congress has considered both amending the Constitution and enacting several alternative legislative measures to give the President the increased authority he has sought and Congress has intermittently resisted.

Although Presidents have uniformly acknowledged that the Constitution affords no inherent authority for a line-item veto[3]—indeed, as explained below, it

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[3] *See, e.g.*, 33 *Writings of George Washington* 96 (1940) ("From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto."); William Howard Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations* 11 (1916) ("[The President] has no power to veto parts of the bill and allow the rest to become a law. He must accept it or reject it . . . ."); 12 Op. Off. Legal Counsel 128, 157-65 (1988) (reviewing other Presidents' views and experience).

Although some commentators have argued that the Constitution does provide inherent authority for a line item veto, *see* Stephen Glazier, *Reagan Already Has Line-Item Veto*, Wall St. J., Dec. 4, 1987, at A14, col. 4; L. Gordon Crovitz, *The Line-Item Veto: The Best Response When Congress Passes One Spending "Bill" A Year*, 18 Pepp. L. Rev. 43 (1990), most scholars have concluded that the text of Article I, Sec. 7, un-

clearly forbids anything but rejection of a bill *in toto*—they have managed to exert their will by "impounding"— or simply not spending—appropriated funds. In some instances, Presidents have refused to spend money on measures that conflicted with their foreign policy objectives, or that would advance an unconstitutional purpose. Most of the time, however, Presidents simply preferred not to spend the money for the purposes for which Congress had allocated it. *See, e.g.*, David A. Martin, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 Yale L.J. 1636, 1644-45 (1973). Some impoundments have been challenged successfully in federal court; others have either been judicially sanctioned or not contested at all. *See City of New Haven v. United States*, 634 F. Supp. 1449, 1454 (D.D.C. 1986), *aff'd* 809 F.2d 900 (D.C. Cir. 1987).

Although presidential impoundments throughout the 19th century occurred in a state of uncertainty as to their legality, Congress has in this century conferred a measure of legitimacy upon them and given some directions as to their use. In the Anti-Deficiency Acts of 1905 and 1906, requiring "appor-

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equivocally precludes such authority. *See, e.g.*, Bruce Fein & William Bradford Reynolds, *Wishful Thinking on a Line-Item Veto*, Legal Times, Nov. 13, 1989, at 30; Lawrence Tribe and Philip Kurland, Letter to Sen. Edward Kennedy, 135 Cong. Rec. S.14,387 (daily ed. Oct. 31, 1989); 12 Op. Off. Legal Counsel 128 (1988); 9 Op. Off. Legal Counsel 28 (1985). Moreover, at least two courts have stated in dicta that the President possesses no inherent item veto. *See Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1124 (9th Cir.), *reh'g en banc ordered*, 863 F.2d 693 (9th Cir. 1988), *withdrawn on other grounds*, 893 F.2d 205 (9th Cir. 1989) (en banc); *Thirteenth Guam Legislature v. Bordallo*, 430 F. Supp. 405, 410 (D. Guam App. Div. 1977), *aff'd*, 588 F.2d 265 (9th Cir. 1978).

tionment" aimed at saving money for the end of a fiscal year, Congress also allowed the President to waive spending appropriations in the event of emergencies or unusual circumstances. Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1257; Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48. When Congress amended the Anti-Deficiency Act in 1950, it created a mechanism for the Executive Branch to recommend the rescission of any reserves not required to carry out the purposes underlying an appropriation. General Appropriation Act of 1951, ch. 896, § 1211(c)(2), 64 Stat. 595 (current version at 31 U.S.C. § 1512(c)(1)).

Congress has not, however, always been sanguine about Presidents' refusal to spend appropriated funds. During the Nixon administration, for example, the President's extensive resort to impoundment prompted many lawsuits. *See City of New Haven*, 634 F. Supp. at 1454 ("by 1974, impoundments had been vitiated in more than 50 cases and upheld in only four"). President Nixon's reluctance to spend appropriated funds also provoked passage of the Impoundment Control Act of 1974 (the "ICA"), Pub. L. No. 93-344, 88 Stat. 332, a statute critical to an understanding of the present Act.

The ICA recognized two types of impoundment: "deferral" and "rescission." Deferral affects the timing of expenditures, and is accomplished by "withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities," or any other type of Executive action or inaction accomplishing the same result. 2 U.S.C. § 682(1). Deferral is permitted for contingencies, to effect savings achieved through changes or efficiency, or as specifically provided by law. 2 U.S.C. § 684(b). Under the

ICA, the President effects a deferral, just as he cancels an item under the Line Item Veto Act, by transmitting to Congress a special message containing statutorily required information. 2 U.S.C. § 684(a). Also like cancellations under the Act, deferrals become effective upon Congress' receipt of the special message; unlike cancellations, however, they expire with the end of the fiscal year.[4] *Id.*

A rescission, under the ICA, is the cancellation of budget authority. 2 U.S.C. § 682(3). In contrast to a cancellation under the Line Item Veto Act, the ICA requires the President to *propose* a rescission by transmitting a special message to Congress, which Congress may enact or not, as it chooses, within 45 days. 2 U.S.C. § 683(b). The perceived deficiency of the rescission process under the ICA that inspired passage of the Line Item Veto Act was the necessity of congressional acquiescence. Whenever Congress neglected or declined to pass a bill enacting into law a proposed rescission—a most frequent occurrence—the rescission expired.

The cancellation procedure embodied in the Line Item Veto Act thus came to be known as "enhanced rescission," the enhancement consisting of elimination of the need for congressional action. Two principal alternatives to the Act considered and rejected by the 104th Congress were "expedited rescission" and "separate enrollment." The first, exemplified by S.14

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[4] Originally, deferrals were automatically effective but subject to a one-House legislative veto. 88 Stat. 335. In light of *INS v. Chadha*, 462 U.S. 919 (1983), the legislative veto component of the ICA was invalidated, *City of New Haven v. Pierce*, 809 F.2d 900 (D.C. Cir 1987), and Congress subsequently amended the ICA to eliminate the offending procedure.

in the 104th Congress, would have preserved the recommendation process but guaranteed that Congress actually and promptly vote on the President's rescission proposals. S. Rep. No. 9, 104th Cong., 1st Sess., at 15 (1995). The second would have treated each item of spending as a separate "bill" for the President to sign or veto. Separate handling of hundreds of items appeared to present insuperable practical obstacles, however, and potential constitutional difficulties as well. *See* 141 Cong. Rec. S.4217, S.4224-35, S.4244 (daily ed. Mar. 21, 1995). Both Houses of Congress also considered and rejected proposed constitutional amendments to impart line item veto authority. S.J. Res. 2, 14, 15, and 16, and H.J. Res. 4, 6, and 17, 104th Cong. (1995).

II.

Before addressing the merits of the case, the Court is obliged to confront defendants' objections as to its justiciability. In a motion to dismiss the complaint defendants contend that plaintiffs lack standing to press their claim. They also assert that the case is not ripe for judicial resolution, and that the "equitable discretion" doctrine requires dismissal. None of these assertions is correct under the law of this Circuit.

Standing[5]

Defendants argue that plaintiffs fail to present a live case or controversy, first, because separation-of-powers considerations counsel against judicial intrusions into disputes between officials of the political

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[5] Only Article III standing, as opposed to prudential limitations, is at issue in light of Congress' creation of an express right of action in § 692(a)(1) of the Act.

branches and, second, because at this point no presidential cancellation has yet been attempted or threatened, and there has, thus, been no discernible injury.

The parties agree on the standard to be applied: plaintiffs must allege, as "an irreducible minimum," (1) an injury personal to them, (2) that has actually been inflicted by defendants or is certainly impending, and (3) that is redressable by judicial decree. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Defendants acknowledge that, pursuant to this well-settled standard, this Circuit has repeatedly recognized Members' standing to challenge measures that affect their constitutionally prescribed lawmaking powers. *See, e.g., Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994) (Members had standing to challenge House Rule permitting delegates to vote in Committee of the Whole based on its alleged vote-diluting effect); *Moore v. U.S. House of Representatives*, 733 F.2d 946, 950-53 (D.C. Cir. 1984) (standing to assert violation of constitutional requirement that revenue-raising bills originate in the House), *cert. denied*, 469 U.S. 1106 (1985); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1168-71 (D.C. Cir.) (standing to challenge leadership's committee-seating assignments), *cert. denied*, 464 U.S. 823 (1983). In each case the D.C. Circuit found no separation-of-powers impediments to adjudication of the merits because, as in the present case, Members' alleged injuries arose from interference with the exercise of identifiable constitutional powers. *See Moore*, 733 F.2d at 951. Although the Supreme Court has never endorsed the

Circuit's analysis of standing in such cases, for this Court's purposes these precedents are controlling.[6]

Plaintiffs' claim of injury in this case, namely, that the Act dilutes their Article I voting power, is likewise of the kind that suffices to confer standing under Article III. Previously, when a Member voted for an appropriations bill containing multiple items, he or she could be certain that any variation of the package once passed would require another vote by both chambers of Congress. Under the Act, however, as plaintiffs describe it, the Member's same vote operates only to present the President with a "menu" of items from which he can select those worthy of his approval, not a legislative *fait accompli* that he must accept or reject in whole, as in the past. As one Senator characterizes it, his vote for an "A-B-C" bill might lead to the *post hoc* creation of an "A-B" law, an "A-C" law, or a "B-C" law, depending on the President's use of his newly conferred cancellation authority, for which neither he nor his colleagues would have voted so reconfigured. Thus, plaintiffs' votes mean something different from what they meant before, for good or ill, and plaintiffs who perceive it as the latter are thus "injured" in a constitutional sense

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[6] Defendants rely on two concurring opinions by D.C. Circuit Judges in arguing that plaintiffs' injury is not sufficiently personal to create a justiciable controversy. *See Moore*, 733 F.2d at 957-61 (Scalia, J., concurring); *Vander Jagt*, 699 F.2d at 1179-82 (Bork, J., concurring). Yet, as the three-judge court, of which then-Judge Scalia was a member, recognized in *Synar v. United States*, 626 F. Supp. 1374, 1382 (D.D.C. 1986), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986), this Circuit's cases unequivocally establish that Members have "a personal interest . . . in the exercise of their governmental powers." 626 F. Supp. at 1381 & n.7.

whenever an appropriations bill comes up for a vote, whatever the President ultimately does with it.

Circuit precedent has recognized only interference with the "constitutionally mandated process of enacting law" as sufficient to confer standing upon Members to maintain legal action for redress. *Moore*, 733 F.2d at 951. According to plaintiffs, their right to formulate an appropriations bill that meets with the approval of a majority of both Houses alone, ignoring presidential preferences, is mandated by the Presentment Clause itself. Under the Act the dynamic of lawmaking is fundamentally altered. Compromises and trade-offs by individual lawmakers must take into account the President's item-by-item cancellation power looming over the end product. The Court concludes that plaintiffs have standing because they allege that the Act "interferes with their 'constitutional duties to enact laws regarding federal spending' and infringes upon their lawmaking powers under Article I, Section 7." *Synar v. United States*, 626 F. Supp. 1374, 1382 (D.D.C. 1986), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986).

Ripeness

Defendants' primary justiciability contention is that plaintiffs must wait until the President cancels an item to bring this lawsuit. Their facial challenge to the Act would elicit an advisory opinion, defendants argue, because whether the President will exercise his authority at all (and whether various other consequences will follow) is entirely speculative. Indeed, courts may not exercise jurisdiction consistent with Article III where a dispute is so unformed as to fail the "case or controversy" requirement. *See Duke Power Co. v. Carolina Environmental Study Group,*

Inc., 438 U.S. 59, 81 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). And in constitutional cases, courts must be particularly careful not to render decisions that are unnecessary. *See United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1019 (1995). The injury that gives shape to a dispute need not have occurred, however, so long as it is "certainly impending." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

In focusing solely on the President's actual exercise of his cancellation power, defendants overlook plaintiffs' allegation of ongoing harm that befalls them irrespective of whether the President ever cancels an item.[7] The Supreme Court considered an analogous claim ripe in *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Airport Noise, Inc.*, 501 U.S. 252 (1991), where a Board of Review composed of Members of Congress possessed an as-yet unexercised power to veto decisions of MWAA's Board of Directors. "The threat of the veto hangs over the Board of Directors like the sword over Damocles, creating a 'here-and-now subservience' to the Board of Review sufficient to raise constitutional questions," the Court held. *Id.* at 265 n.13. *See also*

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[7] Even if an actual cancellation by the President were required to cause injury, Article III arguably would not require plaintiffs to wait for that event to invoke the Court's jurisdiction. *See Abbott Labs v. Gardner*, 387 U.S. 136, 140 (1967); *Buckley v. Valeo*, 424 U.S. 1, 117 (1976) (challenge was ripe in anticipation of "impending future rulings and determinations").

The President has expressed his intention to invoke his new powers under the Act *this year*. *See* 141 Cong. Rec. S.8202-03 (daily ed. June 13, 1995) (containing letter from President to Speaker of the House).

Bowsher v. Synar, 478 U.S. 714, 727 n.5 (1986). Because plaintiffs now find themselves in a position of unanticipated and unwelcome subservience to the President before and after they vote on appropriations bills, Article III is satisfied, and this Court may accede to Congress' directive to address the constitutional cloud over the Act as swiftly as possible.[8]

Plaintiffs' declarations make clear that the budgetary process is already underway. The President presented his budget proposal in early February, and Members will consider and vote on appropriations between now and October 1, 1997, when the new fiscal year begins. Moreover, Congress is likely to vote on supplemental appropriations for this fiscal year in the next few months. To be sure, appropriations votes are inevitable, and "certainly impending." *Whitmore*, 495 U.S. at 158.

Defendants' argument that the case is not ripe because further factual development is required is also unpersuasive. The issues in this case are legal, and thus will not be clarified by further factual development. In what context and when the President cancels an appropriation item is immaterial. The Court will be no better equipped to weigh the constitutionality of the President's cancellation of an

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[8] As in the case of standing, plaintiffs need only satisfy the Article III component of ripeness because Congress unmistakably declared the case fit for judicial review in § 692(c) of the Act. Accordingly, this Circuit's conclusion in *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996) ("*NTEU*"), that prudential (as well as constitutional) considerations made the union's challenge to the Act not ripe is inapposite.

item of spending or a limited tax benefit after the fact; the central issue is plain to see right now.[9]

Finally, defendants assert that plaintiffs' claim is not ripe because the Act might be repealed, or suspended with respect to particular appropriations; a disapproval bill might subsequently vindicate a Member's vote as he intended it; or, if not, Congress could override a presidential veto of a disapproval bill. There are two answers to this argument. First, it ignores the "sword of Damocles" effect that pervades the process irrespective of whether the President ever cancels an item. Second, just because Congress *as a whole* can suspend or repeal the Act, or pass a disapproval bill, does not mean that an *individual* Member's injury is illusory. A Member cannot procure any such relief on his own. Indeed, the possibility of relief from Congress as a whole is just the sort of speculative prospect that the Court would reject if it were instead offered in *support* of standing. Just as the *NTEU* plaintiffs did not have standing simply because the Act made certain injuries possible, 101 F.3d at 1429-30, the present plaintiffs' standing is not undermined by virtue of the fact that the Act makes certain remedies conceivable.

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[9] Moreover, fitness for review is a prudential component of the ripeness doctrine, an inquiry Congress obviated by calling for expedited judicial action. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985); *NTEU*, 101 F.3d at 1431. But even if the Court were to take into account prudential ripeness factors, they actually militate in plaintiffs' favor, because resolving the issue now will avert the cloud that would hang over any canceled item that Congress fails to disapprove.

Equitable Discretion

Defendants urge the Court to exercise its equitable discretion to dismiss the complaint because of separation-of-powers concerns, which apply not only in cases involving internal rules of Congress, *see Skaggs v. Carle*, 898 F. Supp. 1, 2 (D.D.C.), appeal docketed, No. 95-5323 (D.C. Cir. Sept. 25, 1995), but also in cases involving challenges to the validity of the legislation itself, *see Riegle v. Federal Open Market Comm.*, 656 F.2d 873, 881 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

In this case, however, the Court's equitable power to abstain from taking jurisdiction has been foreclosed by Congress' own determination to invite a lawsuit. *See* 2 U.S.C. § 692(a)(1). There is therefore neither reason nor occasion to exercise discretion by avoiding the case. *See Synar*, 626 F. Supp. at 1382 ("Section 274 specifically provides for [declaratory] relief to [Members of Congress], thus eliminating whatever equitable discretion might exist and leaving only the limitations of Article III.").

III.

The Court now turns to the issue presented, namely, whether the Act's conferral of cancellation power upon the President violates the Presentment Clause. The Act enjoys a presumption of validity, and the Court may not undertake to evaluate its wisdom. *See INS v. Chadha*, 462 U.S. 919, 944 (1983). Even if the Act were to appear salutary—or even exigent, given the intractable (and interminable) budget controversy—that fact cannot affect the Court's inquiry. *Id.* Though a court does not lightly resolve to invalidate a law of the United States, it must never-

theless vindicate the Constitution and the governmental framework it envisions. "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). Accordingly, the Supreme Court has "not hesitated to invalidate provisions of law which violate [the separation of powers]," *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Airport Noise, Inc.*, 501 U.S. 252, 273 (1991), and this Court can do no less.

This case is indisputably one of first impression. The issue it poses will undoubtedly be finally resolved by the Supreme Court, but at present such Supreme Court precedent as can be found only intimates what the result will be. It is by that jurisprudence, however, that this Court must be guided, and the lesson of those cases appears to be that not even the most beguiling of upgrades to the machinery of national government will be countenanced unless it comports with the constitutional design.

Shorn of its political and policy-laden implications, this case turns on the narrow and subtle question of whether the President's power under the Act is simply a present-day enlargement of his historically sanctioned impoundment power as it has existed from time to time, as defendants urge, or rather a radical transfer of the legislative power to repeal statutory law, as plaintiffs believe. As explained below, the Court agrees with plaintiffs that, even if Congress may sometimes delegate authority to impound funds, it may not confer the power permanently to rescind an appropriation or tax benefit that has become the law of the United States. That power is possessed by Congress alone, and, according to the Framers' careful design, may not be delegated at all.

The Presentment Clause

The Presentment Clause requires that any bill making or changing federal law must be first passed by both Houses of Congress and then presented to the President *in toto*, in which form he acts upon it, either to make it (or allow it to become) a law, or to return it to Congress for reconsideration.[10] U.S.

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[10] In the Framers' words:

> Every Bill which shall have passed the House of Representatives and the Senate shall, before it become a Law, be presented to the President of the United States; If he approve it he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its return, in which Case it shall not become a Law.

U.S. Const. art. I, § 7, cl. 2.

At the behest of James Madison, the Framers included the following clause to ensure that Congress could not evade the presentment requirement simply by passing legislation in forms other than bills:

> Every Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be

Const. art. I, § 7, cl. 2. Plaintiffs focus on the language of "approval;" the President's primary duty under the Presentment Clause, they say, is one of approval or disapproval. If he approves of the bill, *in toto*, his signature is but a ministerial formality. If he does not approve of it, *in toto*, his duty obliges him to return it with his "objections" to the House in which it originated, or at least to leave it be. If he signs it while disapproving of it—or parts of it—as the Act purports to authorize him to do, then he does so, according to plaintiffs, in violation of the Presentment Clause.

For defendants, the operative words are, "he shall sign it." It is the bright-line act of signing alone that converts a bill into law. Approval is a highly subjective, and a temporal, concept. A President may "approve" of a bill for many reasons, not all of which import enthusiasm for its legislative consequences. A President may sign a bill of which he actually disapproves (as undoubtedly many Presidents have done) for political, diplomatic, or other purposes unrelated to his judgment of its merit.

The Court agrees with defendants that the act of signing a bill is the critical requirement of the Presentment Clause. The President's judgment of approval coincides with his decision to sign a bill; it has no independent operative significance. Whether a

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> necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives according to the Rules and Limitations prescribed in the Case of a Bill.

U.S. Const. art I, § 7, cl. 3.

bill is or is not a law of the United States cannot depend on the President's state of mind when he affixes his signature. He may object to various appropriations and limited tax benefits—that is, he may *disapprove* of them—but nevertheless sign a bill and thereby remain in full compliance with the Presentment Clause. Likewise, no subsequent action by the President is capable of retroactively undermining the approval he registered with his signature. By that time the Article I approval process has run its course, and the bill indisputably has become a law of the United States. *See United States v. Will*, 449 U.S. 200, 224-25 & n.29 (1980); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899); *Burgess v. Salmon*, 97 U.S. 381, 384-85 (1878).

Yet, although the Court agrees that statutes subject to cancellation will have been "approved" in accordance with the Presentment Clause, the Act is vulnerable to the additional charge that, following approval, a cancellation by the President is a legislative repeal that itself must comply with Presentment Clause procedures. The Court must resolve this issue in light of the Supreme Court's admonishment that "[t]he legislative steps outlined in Art. I are not empty formalities; they were designed to assure that both Houses of Congress and the President participate in the exercise of lawmaking authority." *Chadha*, 462 U.S. at 958 n.22. It is insufficient, therefore, for defendants to argue that, notwithstanding the resemblance between a cancellation and a statutory repeal, the Act should stand because the same result could be accomplished through clearly constitutional means. Rather, "the purposes underlying the Presentment Clause . . . must guide resolution of

the question whether a given procedure is constitutional." *Id.* at 946.

Fundamentally, the Presentment Clause enforces "bicameralism" and circumscribes the President's ability to act unilaterally. *See Field v. Clark*, 143 U.S. 649, 692-93 (1892). It embodies "the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S. at 951. The President's contribution to the process is his approval of (or objection to) legislation as Congress presents it to him. His is merely a qualified check on the will of the legislature. *See* 1 *The Records of the Federal Convention of 1787* at 97-105 (Max Farrand ed., 1987). The President must consider the whole of the bill presented, which, in today's world of omnibus appropriations and myriad riders, is an undeniably difficult task. Nevertheless, upon considering a bill, he must reach a final judgment: either "approve it," or "not." U.S. Const. art I. § 7, cl. 2. Once he has by his signature transformed the whole bill into a law of the United States, the President's sole duty is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

Where the President signs a bill but then purports to cancel parts of it, he exceeds his constitutional authority and prevents both Houses of Congress from participating in the exercise of lawmaking authority. The President's cancellation of an item unilaterally effects a repeal of statutory law such that the bill he signed is not the law that will govern the Nation.

That is precisely what the Presentment Clause was designed to prevent.

Delegation of Spending Authority vs. Exercise of Lawmaking Power

Defendants dismiss the notion that the Act represents an abdication of Congress' Article lawmaking I power, arguing that it merely ratifies traditional impoundment authority of the President in a novel form. Defendants and *amici* both allude to a long history of presidential impoundments, many of which have been tested by courts, and as to which the issue has been confined primarily to whether Congress intended to delegate discretion to the President not to spend money it had appropriated; that is, whether its appropriations were permissive or mandatory. *See, e.g., Train v. City of New York*, 420 U.S. 35, 41 (1975); *City of New Haven v. United States*, 634 F. Supp. 1449, 1454 n.6 (D.D.C. 1986) (citing cases), *aff'd* 809 F.2d 900 (D.C. Cir. 1987). The effect of the ICA was to make all appropriations presumptively mandatory. The Line Item Veto Act merely reverses that presumption, at least for a period of five days. During that limited period, the President has the option to "cancel" any appropriation—he may not change it in any manner—after which it remains in the law as he signed it, to be faithfully executed with the remainder.[11] If he cancels it with an appropriate message to Congress, it is extinguished, as if it had never been part of the bill, unless Congress revives it with a new bill, passed like any other by both Houses of Congress

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[11] Defendants cite no analog, as a species of impoundment or anything else, however, to the power to "cancel" limited tax benefits found in the Act.

and presented anew to the President. In the meantime no money can be spent for it, just as would have been the case had it been "deferred" or "rescinded" in accordance with the ICA. The Line Item Veto Act is, therefore, according to defendants, merely an advance delegation by Congress to the President of a brief period of discretion to spend or not, as his judgment dictates, subject to the broad injunctions that his decision not to spend operate to reduce the deficit, and will not impair any essential Government functions or harm the national interest. It is, they say, "evolutionary, not revolutionary," Def. Motion for Summary Judgment at 3, in the perpetual contest of will between Congress and the President in matters of the federal budget.

It has long been held that Congress may—indeed, of necessity, must—delegate vast authority to the Executive Branch of government to make and to change rules for the governance of national affairs, so long as they are in furtherance of the will of Congress. When courts have inquired into whether Congress has abdicated its legislative function in cases of allegedly overbroad delegations, their sole concern is whether Congess itself articulated "intelligible principles" by which delegated authority is to be exercised. *See Mistretta v. United States*, 488 U.S. 361, 372; *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406, 409 (1928). Since 1935, the Supreme Court has "upheld, without exception, delegations under standards phrased in sweeping terms." *Loving v. United States*, 116 S. Ct. 1737, 1750 (1996). Defendants are therefore correct that, if the Act's conferral of cancellation power, at least with respect to appropriations, can be equated with a delegation of impoundment authority, their burden under the delegation

standard is not "a tough one." *National Fed'n of Fed. Employees v. United States*, 905 F.2d 400, 404 (D.C. Cir. 1990).[12]

But defendants are mistaken in asserting that Article I concerns disappear once the President has signed a bill into law, and, consequently, that the delegation doctrine is the only hurdle for them to surmount. Their analysis assumes that Congress conferred a delegable power. It did not; it ceded basic legislative authority. The Constitution vests "all legislative Powers" of the United States in Congress, U.S. Const. art. I, § 1, including the power to repeal. *Chadha*, 462 U.S. at 954. As *Chadha* made clear, there are formal aspects of the legislative process that Congress may not alter. Just as Congress could not delegate to one of its chambers the power to veto select provisions of law, it may not assign that authority to the President. Before the question of a delegation's excessiveness ever arises, then, a court must be convinced that Congress did not attempt to alienate one of its basic functions.

In no case where the Supreme Court decided that a delegation of broad authority was saved by Congress' articulation of intelligible principles was the Court faced with an equivalent of the cancellation power given to the President by the Line Item Veto Act. Cancellation under the Act is simply not the same thing as impoundment, or any other suspension of a

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[12] *See, e.g., Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 219 (1989) (upholding delegation of authority to establish and collect pipeline safety fees); *Lichter v. United States*, 334 U.S. 742, 778 (1948) (upholding grant of power to recover excessive wartime profits); and *Yakus v. United States*, 321 U.S. 414, 424 (1944) (upholding broad delegation of price-fixing authority).

statutory provision. Instead, cancellation is equivalent to repeal[13]—and "repeal of statutes, no less than enactment, must conform with Art. I." *Chadha*, 462 U.S. at 954. Cancellation forever renders a provision of federal law without legal force or effect, so the President who canceled an item and his successors must turn to Congress to reauthorize the foregone spending. Whereas delegated authority to impound is exercised from time to time, in light of changed circumstances or shifting executive (or legislative) priorities, cancellation occurs immediately and irreversibly in the wake of the operationalizing "approval" of the bill containing the very same measures being rescinded.

Thus the cancellation power conferred by the Act is indeed revolutionary, as plaintiffs assert. Never before has Congress attempted to give away the power to shape the content of a statute of the United States, as the Act purports to do. As expansive as its delegations of power may have been in the past, none has gone so far as to transfer the function of repealing a provision of statutory law. The power to "make" the laws of the nation is the exclusive, nondelegable power of Congress which the Line Item Veto purports to alienate in part for eight years. That it can be recaptured if Congress repeals the Act, or suspends it (either in general, or in particular circumstances) does not alter the fact that, until Congress does so by a separate bill which the

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[13] As noted *supra*, p.4, § 691e(4) of the Act defines the verb "cancel" as meaning "to rescind." *Webster's Third New International Dictionary* 1924 (G.&C. Merriam Co. 1981) defines the verb "repeal" as meaning "1: to rescind or revoke (as a sentence or law) from operation or effect."

President signs (or as to which his veto is overridden), the President has become a co-maker of the Nation's laws. The duty of the President with respect to such laws is to "take care that [they] be faithfully executed." U.S. Const. art II, § 3. Canceling, *i.e.*, repealing, parts of a law cannot be considered its faithful execution.[14]

Moreover, if cancellation power could constitutionally be delegated as to appropriations and limited tax benefits, defendants have yet to show a tenable constitutional distinction between appropriation and tax laws, on the one hand, and all other laws, on the other. In fact, defendants deny any obligation to suggest such a distinction at all. At oral argument they insisted that there is virtually no limit to the express Article I powers Congress may delegate if it chooses, so long as it articulates "intelligible principles" by which its delegee is to be guided. If that is so—if Congress can delegate to the President the power to reconfigure an appropriations or tax benefit bill—why can he not also cancel provisions of an environmental protection or civil rights law he disfavors, and upon exactly the same "principles" as are to guide his exercise of cancellation authority under the Line Item Veto Act?

As authority for the proposition that it is constitutionally permissible for Congress to delegate to the President the power to render a law of the United

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[14] Defendants suggest that, in canceling future appropriations, the President will, in fact, be faithfully executing the Line Item Veto Act to reduce the deficit. But the Act contains no mandate to the President to reduce the deficit. It merely conditions cancellations for whatever reason upon, *inter alia*, their having a deficit-reducing effect.

States inoperable, defendants cite the case of *Field v. Clark*, 143 U.S. 649 (1892). Aside from the fact that the presidential action approved by the Supreme Court in *Field v. Clark* was merely the "suspension" of duly enacted tariffs, not their cancellation, the case is also distinguishable on the ground that the Supreme Court recognized the practice of "legislating in contingency;" that is, where Congress itself determines in advance when conditions yet to occur should cause the law to cease to be operative. The President is merely the instrument of its will. *Id.* at 683-92. *See also United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533, 577-78 (1939); *Currin v. Wallace*, 306 U.S. 1, 15-16 (1939); *The Brig Aurora*, 11 U.S. (7 Cranch) 382, 388 (1813).[15] The Line Item Veto Act, in contrast, hands off to the President authority over fundamental legislative choices. Indeed, that is its reason for being. It spares Congress the burden of making those vexing choices of which programs to

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[15] As the Supreme Court further explained in *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407 (1928), 30 years later:

> Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be affected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district.

preserve and which to cut. Thus, by placing on itself the "onus" of overriding the President's cancellations, *see* H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. at 16 (1996), Congress has turned the constitutional division of responsibilities for legislating on its head.

The Court therefore agrees with plaintiffs. In those Supreme Court cases which this Court finds most instructive for its purposes, most notably *Chadha*, the Supreme Court has repeatedly counseled that when the Constitution speaks to the matter, the Constitution alone controls the way in which governmental powers shall be exercised.[16] The formalities of the constitutional framework must be respected; the several estates subject to it must function within the spheres the Constitution allots to them.

IV.

In passing the Act, Congress and the President addressed the significant problem of runaway spending, striving to create a more efficient process. But "the Framers ranked other values higher than efficiency." *Chadha*, 462 U.S. at 959. As the Court elaborated:

> With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

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[16] *See also Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991); *Bowsher v. Synar*, 478 U.S. 714 (1986); *cf. U.S. Term Limits v. Thornton*, 115 S. Ct. 1842 (1995).

Id. Various legislative alternatives remain available to give the President a more significant role in restraining government spending. For example, the "expedited rescission" model favored by many Members of the 104th Congress would retain the President's role as a recommender of rescissions, *see* U.S. Const. art. II, § 3, and force Congress to vote on such proposals. And, of course, Congress remains free to attempt passage of a constitutional amendment if it determines that the President should have unilateral revisionary power.

For the foregoing reasons, it is, this *10th* day of April, 1997,

ORDERED, that defendants' motion to dismiss the complaint and motion for summary judgment are denied; and it is

FURTHER ORDERED, that plaintiffs' motion for summary judgment is granted; and it is

FURTHER ORDERED, that the Line Item Veto Act, Pub. Law No. 104-130, 110 Stat. 1200 (1996), is adjudged and declared unconstitutional.

/s/ THOMAS PENFIELD JACKSON
THOMAS PENFIELD JACKSON
U.S. District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 97-0001 (TPJ)

SENATOR ROBERT C. BYRD, ET AL.,
PLAINTIFFS

v.

FRANKLIN D. RAINES, DIRECTOR, OFFICE OF
MANAGEMENT AND BUDGET, ET AL., DEFENDANTS

[Filed: Apr. 11, 1997]

NOTICE OF APPEAL

Franklin D. Raines, Director, Office of Management and Budget, and Robert E. Rubin, Secretary of the Treasury, defendants, appeal to the United States Supreme Court from the Memorandum and Order issued by this Court on April 10, 1997.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

ERIC H. HOLDER, JR.,
United States Attorney

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DAVID J. ANDERSON
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APPENDIX C

Public Law 104-130, 104th Congress

An Act

To give the President line item veto authority with respect to appropriations, new direct spending, and limited tax benefits

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Line Item Veto Act".

SEC. 2. LINE ITEM VETO AUTHORITY.

(a) IN GENERAL.—Title X of the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. 681 et seq.) is amended by adding at the end the following new part:

"PART C—LINE ITEM VETO

"LINE ITEM VETO AUTHORITY

"SEC. 1021. (a) IN GENERAL.—Notwithstanding the provisions of parts A and B, and subject to the provisions of this part, the President may, with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States, cancel in whole—

"(1) any dollar amount of discretionary budget authority;

"(2) any item of new direct spending; or

"(3) any limited tax benefit;

if the President—

"(A) determines that such cancellation will—

"(i) reduce the Federal budget deficit;

"(ii) not impair any essential Government functions; and

"(iii) not harm the national interest; and

"(B) notifies the Congress of such cancellation by transmitting a special message, in accordance with section 1022, within five calendar days (excluding Sundays) after the enactment of the law providing the dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit that was canceled.

"(b) IDENTIFICATION OF CANCELLATIONS.—In identifying dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits for cancellation, the President shall—

"(1) consider the legislative history, construction, and purposes of the law which contains such dollar amounts, items, or benefits;

"(2) consider any specific sources of information referenced in such law or, in the absence of specific sources of information, the best available information; and

"(3) use the definitions contained in section 1026 in applying this part to the specific provisions of such law.

"(c) EXCEPTION FOR DISAPPROVAL BILLS.—The authority granted by subsection (a) shall not apply to any dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit contained in any law that is a disapproval bill as defined in section 1026.

"SPECIAL MESSAGES

"SEC. 1022. (a) IN GENERAL.—For each law from which a cancellation has been made under this part, the President shall transmit a single special message to the Congress.

"(b) CONTENTS.—

"(1) The special message shall specify—

"(A) the dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit which has been canceled, and provide a corresponding reference number for each cancellation;

"(B) the determinations required under section 1021(a), together with any supporting material;

"(C) the reasons for the cancellation;

"(D) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the cancellation;

"(E) all facts, circumstances and considerations relating to or bearing upon the cancellation, and to the maximum extent practicable, the estimated effect of the cancellation upon

the objects, purposes and programs for which the canceled authority was provided; and

"(F) include the adjustments that will be made pursuant to section 1024 to the discretionary spending limits under section 601 and an evaluation of the effects of those adjustments upon the sequestration procedures of section 251 of the Balanced Budget and Emergency Deficit Control Act of 1985.

"(2) In the case of a cancellation of any dollar amount of discretionary budget authority or item of new direct spending, the special message shall also include, if applicable—

"(A) any account, department, or establishment of the Government for which such budget authority was to have been available for obligation and the specific project or governmental functions involved;

"(B) the specific States and congressional districts, if any, affected by the cancellation; and

"(C) the total number of cancellations imposed during the current session of Congress of States and congressional districts identified in subparagraph (B).

"(c) TRANSMISSION OF SPECIAL MESSAGES TO HOUSE AND SENATE.—

"(1) The President shall transmit to the Congress each special message under this part within five calendar days (excluding Sundays)

after enactment of the law to which the cancellation applies. Each special message shall be transmitted to the House of Representatives and the Senate on the same calendar day. Such special message shall be delivered to the Clerk of the House of Representatives if the House is not in session, and to the Secretary of the Senate if the Senate is not in session.

"(2) Any special message transmitted under this part shall be printed in the first issue of the Federal Register published after such transmittal.

"CANCELLATION EFFECTIVE UNLESS DISAPPROVED

"SEC. 1023. (a) IN GENERAL.—The cancellation of any dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit shall take effect upon receipt in the House of Representatives and the Senate of the special message notifying the Congress of the cancellation. If a disapproval bill for such special message is enacted into law, then all cancellations disapproved in that law shall be null and void and any such dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit shall be effective as of the original date provided in the law to which the cancellation applied.

"(b) COMMENSURATE REDUCTIONS IN DISCRETIONARY BUDGET AUTHORITY.—Upon the cancellation of a dollar amount of discretionary budget authority under subsection (a), the total appropriation for each relevant account of which that dollar amount is a part

shall be simultaneously reduced by the dollar amount of that cancellation.

"DEFICIT REDUCTION

"SEC. 1024. (a) IN GENERAL.—

"(1) DISCRETIONARY BUDGET AUTHORITY.—OMB shall, for each dollar amount of discretionary budget authority and for each item of new direct spending canceled from an appropriation law under section 1021(a)—

"(A) reflect the reduction that results from such cancellation in the estimates required by section 251(a)(7) of the Balanced Budget and Emergency Deficit Control Act of 1985 in accordance with the Act, including an estimate of the reduction of the budget authority and the reduction in outlays flowing from such reduction of budget authority for each outyear; and

"(B) include a reduction to the discretionary spending limits for budget authority and outlays in accordance with the Balanced Budget and Emergency Deficit Control Act of 1985 for each applicable fiscal year set forth in section 601(a)(2) by amounts equal to the amounts for each fiscal year estimated pursuant to subparagraph (A).

"(2) DIRECT SPENDING AND LIMITED TAX BENEFITS.—(A) OMB shall, for each item of new direct spending or limited tax benefit canceled from a law under secton 1021(a), estimate the deficit decrease caused by the cancellation of such

item or benefit in that law and include such estimate as a separate entry in the report prepared pursuant to section 252(d) of the Balanced Budget and Emergency Deficit Control Act of 1985.

"(B) OMB shall not include any change in the deficit resulting from a cancellation of any item of new direct spending or limited tax benefit, or the enactment of a disapproval bill for any such cancellation, under this part in the estimates and reports required by sections 252(b) and 254 of the Balanced Budget and Emergency Deficit Control Act of 1985.

"(b) ADJUSTMENTS TO SPENDING LIMITS.—After ten calendar days (excluding Sundays) after the expiration of the time period in section 1025(b)(1) for expedited congressional consideration of a disapproval bill for a special message containing a cancellation of discretionary budget authority, OMB shall make the reduction included in subsection (a)(1)(B) as part of the next sequester report required by section 254 of the Balanced Budget and Emergency Deficit Control Act of 1985.

"(c) EXCEPTION.—Subsection (b) shall not apply to a cancellation if a disapproval bill or other law that disapproves that cancellation is enacted into law prior to 10 calendar days (excluding Sundays) after the expiration of the time period set forth in section 1025(b)(1).

"(d) CONGRESSIONAL BUDGET OFFICE ESTIMATES.—As soon as practicable after the President makes a cancellation from a law under section 1021(a), the Director of the Congressional Budget Office shall provide the Committees on the Budget of the House of

Representatives and the Senate with an estimate of the reduction of the budget authority and the reduction in outlays flowing from such reduction of budget authority for each outyear.

"EXPEDITED CONGRESSIONAL CONSIDERATION OF DISAPPROVAL BILLS

"SEC. 1025. (a) RECEIPT AND REFERRAL OF SPECIAL MESSAGE.—Each special message transmitted under this part shall be referred to the Committee on the Budget and the appropriate committee or committees of the Senate and the Committee on the Budget and the appropriate committee or committees of the House of Representatives. Each such message shall be printed as a document of the House of Representatives.

"(b) TIME PERIOD FOR EXPEDITED PROCEDURES.—

"(1) There shall be a congressional review period of 30 calendar days of session, beginning on the first calendar day of session after the date on which the special message is received in the House of Representatives and the Senate, during which the procedures contained in this section shall apply to both Houses of Congress.

"(2) In the House of Representatives the procedures set forth in this section shall not apply after the end of the period described in paragraph (1).

"(3) If Congress adjourns at the end of a Congress prior to the expiration of the period described in paragraph (1) and a disapproval bill was then pending in either House of Congress or a committee thereof (including a conference com-

mittee of the two Houses of Congress), or was pending before the President, a disapproval bill for the same special message may be introduced within the first five calendar days of session of the next Congress and shall be treated as a disapproval bill under this part, and the time period described in paragraph (1) shall commence on the day of introduction of that disapproval bill.

"(c) INTRODUCTION OF DISAPPROVAL BILLS.—(1) In order for a disapproval bill to be considered under the procedures set forth in this section, the bill must meet the definition of a disapproval bill and must be introduced no later than the fifth calendar day of session following the beginning of the period described in subsection (b)(1).

"(2) In the case of a disapproval bill introduced in the House of Representatives, such bill shall include in the first blank space referred to in section 1026(6)(C) a list of the reference numbers for all cancellations made by the President in the special message to which such disapproval bill relates.

"(d) CONSIDERATION IN THE HOUSE OF REPRESENTATIVES.—(1) Any committee of the House of Representatives to which a disapproval bill is referred shall report it without amendment, and with or without recommendation, not later than the seventh calendar day of session after the date of its introduction. If any committee fails to report the bill within that period, it is in order to move that the House discharge the committee from further consideration of the bill, except that such a motion may not be made after the committee has reported a disapproval bill with respect to the same special message. A motion to discharge may be made only by a Member favoring the bill (but

only at a time or place designated by the Speaker in the legislative schedule of the day after the calendar day on which the Member offering the motion announces to the House his intention to do so and the form of the motion). The motion is highly privileged. Debate thereon shall be limited to not more than one hour, the time to be divided in the House equally between a proponent and an opponent. The previous question shall be considered as ordered on the motion to its adoption without intervening motion. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order.

"(2) After a disapproval bill is reported or a committee has been discharged from further consideration, it is in order to move that the House resolve into the Committee of the Whole House on the State of the Union for consideration of the bill. If reported and the report has been available for at least one calendar day, all points of order against the bill and against consideration of the bill are waived. If discharged, all points of order against the bill and against consideration of the bill are waived. The motion is highly privileged. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. During consideration of the bill in the Committee of the Whole, the first reading of the bill shall be dispensed with. General debate shall proceed, shall be confined to the bill, and shall not exceed one hour equally divided and controlled by a proponent and an opponent of the bill. The bill shall be considered as read for amendment under the five-minute rule. Only one motion to rise shall be in order, except if offered by the manager. No amendment to the bill is in order, except any Member if sup-

ported by 49 other Members (a quorum being present) may offer an amendment striking the reference number or numbers of a cancellation or cancellations from the bill. Consideration of the bill for amendment shall not exceed one hour excluding time for recorded votes and quorum calls. No amendment shall be subject to further amendment, except pro forma amendments for the purposes of debate only. At the conclusion of the consideration of the bill for amendment, the Committee shall rise and report the bill to the House with such amendments as may have been adopted. The previous question shall be considered as ordered on the bill and amendments thereto to final passage without intervening motion. A motion to reconsider the vote on passage of the bill shall not be in order.

"(3) Appeals from decisions of the Chair regarding application of the rules of the House of Representatives to the procedure relating to a disapproval bill shall be decided without debate.

"(4) It shall not be in order to consider under this subsection more than one disapproval bill for the same special message except for consideration of a similar Senate bill (unless the House has already rejected a disapproval bill for the same special message) or more than one motion to discharge described in paragraph (1) with respect to a disapproval bill for that special message.

"(e) CONSIDERATION IN THE SENATE.—

"(1) REFERRAL AND REPORTING.—Any disapproval bill introduced in the Senate shall be referred to the appropriate committee or committees. A committee to which a disapproval bill has

been referred shall report the bill not later than the seventh day of session following the date of introduction of that bill. If any committee fails to report the bill within that period, that committee shall be automatically discharged from further consideration of the bill and the bill shall be placed on the Calendar.

"(2) DISAPPROVAL BILL FROM HOUSE.—When the Senate receives from the House of Representatives a disapproval bill, such bill shall not be referred to committee and shall be placed on the Calendar.

"(3) CONSIDERATION OF SINGLE DISAPPROVAL BILL.—After the Senate has proceeded to the consideration of a disapproval bill for a special message, then no other disapproval bill originating in that same House relating to that same message shall be subject to the procedures set forth in this subsection.

"(4) AMENDMENTS.—

"(A) AMENDMENTS IN ORDER.—The only amendments in order to a disapproval bill are—

"(i) an amendment that strikes the reference number of a cancellation from the disapproval bill; and

"(ii) an amendment that only inserts the reference number of a cancellation included in the special message to which the disapproval bill relates that is not already contained in such bill.

"(B) WAIVER OR APPEAL.—An affirmative vote of three-fifths of the Senators, duly chosen and sworn, shall be required in the Senate—

"(i) to waive or suspend this paragraph; or

"(ii) to sustain an appeal of the ruling of the Chair on a point of order raised under this paragraph.

"(5) MOTION NONDEBATABLE.—A motion to proceed to consideration of a disapproval bill under this subsection shall not be debatable. It shall not be in order to move to reconsider the vote by which the motion to proceed was adopted or rejected, although subsequent motions to proceed may be made under this paragraph.

"(6) LIMIT ON CONSIDERATION.—(A) After no more than 10 hours of consideration of a disapproval bill, the Senate shall proceed, without intervening action or debate (except as permitted under paragraph (9)), to vote on the final disposition thereof to the exclusion of all amendments not then pending and to the exclusion of all motions, except a motion to reconsider or to table.

"(B) A single motion to extend the time for consideration under subparagraph (A) for no more than an additional five hours is in order prior to the expiration of such time and shall be decided without debate.

"(C) The time for debate on the disapproval bill shall be equally divided between the Majority Leader and the Minority Leader or their designees.

"(7) DEBATE ON AMENDMENTS.—Debate on any amendment to a disapproval bill shall be limited to one hour, equally divided and controlled by the Senator proposing the amendment and the majority manager, unless the majority manager is in favor of the amendment, in which case the minority manager shall be in control of the time in opposition.

"(8) NO MOTION TO RECOMMIT.—A motion to recommit a disapproval bill shall not be in order.

"(9) DISPOSITION OF SENATE DISAPPROVAL BILL.—If the Senate has read for the third time a disapproval bill that originated in the Senate, then it shall be in order at any time thereafter to move to proceed to the consideration of a disapproval bill for the same special message received from the House of Representatives and placed on the Calendar pursuant to paragraph (2), strike all after the enacting clause, substitute the text of the Senate disapproval bill, agree to the Senate amendment, and vote on final disposition of the House disapproval bill, all without any intervening action or debate.

"(10) CONSIDERATION OF HOUSE MESSAGE.—Consideration in the Senate of all motions, amendments, or appeals necessary to dispose of a message from the House of Representatives on a

disapproval bill shall be limited to not more than four hours. Debate on each motion or amendment shall be limited to 30 minutes. Debate on any appeal or point of order that is submitted in connection with the disposition of the House message shall be limited to 20 minutes. Any time for debate shall be equally divided and controlled by the proponent and the majority manager, unless the majority manager is a proponent of the motion, amendment, appeal, or point of order, in which case the minority manager shall be in control of the time in opposition.

"(f) CONSIDERATION IN CONFERENCE.—

"(1) CONVENING OF CONFERENCE.—In the case of disagreement between the two Houses of Congress with respect to a disapproval bill passed by both Houses, conferees should be promptly appointed and a conference promptly convened, if necessary.

"(2) HOUSE CONSIDERATION.—(A) Notwithstanding any other rule of the House of Representatives, it shall be in order to consider the report of a committee of conference relating to a disapproval bill provided such report has been available for one calendar day (excluding Saturdays, Sundays, or legal holidays, unless the House is in session on such a day) and the accompanying statement shall have been filed in the House.

"(B) Debate in the House of Representatives on the conference report and any amendments in disagreement on any disapproval bill shall each be limited to not more than one hour equally divided

and controlled by a proponent and an opponent. A motion to further limit debate is not debatable. A motion to recommit the conference report is not in order, and it is not in order to move to reconsider the vote by which the conference report is agreed to or disagreed to.

"(3) SENATE CONSIDERATION.—Consideration in the Senate of the conference report and any amendments in disagreement on a disapproval bill shall be limited to not more than four hours equally divided and controlled by the Majority Leader and the Minority Leader or their designees. A motion to recommit the conference report is not in order.

"(4) LIMITS ON SCOPE.—(A) When a disagreement to an amendment in the nature of a substitute has been referred to a conference, the conferees shall report those cancellations that were included in both the bill and the amendment, and may report a cancellation included in either the bill or the amendment, but shall not include any other matter.

"(B) When a disagreement on an amendment or amendments of one House to the disapproval bill of the other House has been referred to a committee of conference, the conferees shall report those cancellations upon which both Houses agree and may report any or all of those cancellations upon which there is disagreement, but shall not include any other matter.

"DEFINITIONS

"SEC. 1026. As used in this part:

"(1) APPROPRIATION LAW.—The term 'appropriation law' means an Act referred to in section 105 of title 1, United States Code, including any general or special appropriation Act, or any Act making supplemental, deficiency, or continuing appropriations, that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States.

"(2) CALENDAR DAY.—The term 'calendar day' means a standard 24-hour period beginning a midnight.

"(3) CALENDAR DAYS OF SESSION.—The term 'calendar days of session' shall mean only those days on which both Houses of Congress are in session.

"(4) CANCEL.—The term 'cancel' or 'cancellation' means—

"(A) with respect to any dollar amount of discretionary budget authority, to rescind;

"(B) with respect to any item of new direct spending—

"(i) that is budget authority provided by law (other than an appropriation law), to prevent such budget authority from having legal force or effect;

"(ii) that is entitlement authority, to prevent the specific legal obligation of the United States from having legal force or effect; or

"(iii) through the food stamp program, to prevent the specific provision of law that results in an increase in budget authority or outlays for that program from having legal force or effect; and

"(C) with respect to a limited tax benefit, to prevent the specific provision of law that provides such benefit from having legal force of effect.

"(5) DIRECT SPENDING.—The term 'direct spending' means—

"(A) budget authority provided by law (other than an appropriation law);

"(B) entitlement authority; and

"(C) the food stamp program.

"(6) DISAPPROVAL BILL.—The term 'disapproval bill' means a bill or joint resolution which only disapproves one or more cancellations of dollar amounts of discretionary budget authority, items of new direct spending, or limited tax benefits in a special message transmitted by the President under this part and—

"(A) the title of which is as follows: 'A bill disapproving the cancellations transmitted by the President on ____, the blank space being filled in with the date of transmission of the relevant special message and the public law number to which the message relates;

"(B) which does not have a preamble; and

"(C) which provides only the following after the enacting clause: 'That Congress disapproves of

cancellations ___', the blank space being filled in with a list by reference number of one or more cancellations contained in the President's special message, 'as transmitted by the President in a special message on __', the blank space being filled in with the appropriate date, 'regarding ___.', the blank space being filled in with the public law number to which the special message relates.

"(7) DOLLAR AMOUNT OF DISCRETIONARY BUDGET AUTHORITY.—(A) Except as provided in subparagraph (B), the term 'dollar amount of discretionary budget authority' means the entire dollar amount of budget authority—

"(i) specified in an appropriation law, or the entire dollar amount of budget authority required to be allocated by a specific proviso in a appropriation law for which a specific dollar figure was not included;

"(ii) represented separately in any table, chart, of explanatory text included in the statement of managers or the governing committee report accompanying such law;

"(iii) required to be allocated for a specific program, project, or activity in a law (other than an appropriation law) that mandates the expenditure of budget authority from accounts, programs, projects, or activities for which budget authority is provided in an appropriation law;

"(iv) represented by the product of the estimated procurement cost and the total quantity of items specified in an appropriation law or included

in the statement of managers or the governing committee report accompanying such law; and

"(v) represented by the product of the estimated procurement cost and the total quantity of items required to be provided in a law (other than an appropriation law) that mandates the expenditure of budget authority from accounts, programs, projects, or activities for which budget authority is provided in an appropriation law.

"(B) The term 'dollar amount of discretionary budget authority' does not include—

"(i) direct spending;

"(ii) budget authority in an appropriation law which funds direct spending provided for in other law;

"(iii) any existing budget authority rescinded or canceled in an appropriation law; or

"(iv) any restriction, condition, or limitation in an appropriation law or the accompanying statement of managers or committee reports on the expenditure of budget authority for an account, program, project, or activity, or on activities involving such expenditure.

"(8) ITEM OF NEW DIRECT SPENDING.—The term 'item of new direct spending' means any specific provision of law that is estimated to result in an increase in budget authority or outlays for direct spending relative to the most recent levels calculated pursuant to section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985.

"(9) LIMITED TAX BENEFIT.—(A) The term 'limited tax benefit' means-

"(i) any revenue-losing provision which provides a Federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries under the Internal Revenue Code of 1986 in any fiscal year for which the provision is in effect; and

"(ii) any Federal tax provision which provides temporary or permanent transitional relief for 10 or fewer beneficiaries in any fiscal year from a change to the Internal Revenue Code of 1986.

"(B) A provision shall not be treated as described in subparagraph (A)(i) if the effect of that provision is that—

"(i) all persons in the same industry or engaged in the same type of activity receive the same treatment;

"(ii) all persons owning the same type of property, or issuing the same type of investment, receive the same treatment; or

"(iii) any difference in the treatment of persons is based solely on—

"(I) in the case of businesses and associations, the size or form of the business or association involved;

"(II) in the case of individuals, general demographic conditions, such as income, marital status, number of dependents, or tax return filing status;

"(III) the amount involved; or

"(IV) a generally-available election under the Internal Revenue Code of 1986.

"(C) A provision shall not be treated as described in subparagraph (A)(ii) if—

"(i) it provides for the retention of prior law with respect to all binding contracts or other legally enforceable obligations in existence on a date contemporaneous with congressional action specifying such date; or

"(ii) it is a technical correction to previously enacted legislation that is estimated to have no revenue effect.

"(D) For purposes of subparagraph (A)—

"(i) all businesses and associations which are related within the meaning of sections 707(b) and 1563(a) of the Internal Revenue Code of 1986 shall be treated as a single beneficiary;

"(ii) all qualified plans of an employer shall be treated as a single beneficiary;

"(iii) all holders of the same bond issue shall be treated as a single beneficiary; and

"(iv) if a corporation, partnership, association, trust or estate is the beneficiary of a provision, the shareholders of the corporation, the partners of the partnership, the members of the association, or the beneficiaries of the trust or estate shall not also be treated as beneficiaries of such provision.

"(E) For purposes of this paragraph, the term 'revenue-losing provision' means any provision which results in a reduction in Federal tax revenues for any one of the two following periods—

"(i) the first fiscal year for which the provision is effective; or

"(ii) the period of the 5 fiscal years beginning with the first fiscal year for which the provisions is effective.

"(F) The terms used in this paragraph shall have the same meaning as those terms have generally in the Internal Revenue Code of 1986, unless otherwise expressly provided.

"(10) OMB.—The term 'OMB' means the Director of the Office of Management and Budget.

"IDENTIFICATION OF LIMITED TAX BENEFITS

"SEC. 1027. (a) STATEMENT BY JOINT TAX COMMITTEE.—The Joint Committee on Taxation shall review any revenue or reconciliation bill or joint resolution which includes any amendment to the Internal Revenue Code of 1986 that is being prepared for filing by a committee of conference of the two Houses, and shall identify whether such bill or joint resolution contains any limited tax benefits. The Joint Committee on Taxation shall provide to the committee of conference a statement identifying and such limited tax benefits or declaring that the bill or joint resolution does not contain any limited tax benefits. Any such statement shall be made available to any Member of Congress by the Joint Committee on Taxation immediately upon request.

"(b) STATEMENT INCLUDED IN LEGISLATION.—(1) Notwithstanding any other rule of the House of Representatives or any rule or precedent of the Senate, any revenue or reconciliation bill or joint resolution which includes any amendment to the Internal Revenue Code of 1986 reported by a committee of conference of the two Houses may include, as a separate section of such bill or joint resolution, the information contained in the statement of the Joint Committee on Taxation, but only in the manner set forth in paragraph (2)

"(2) The separate section permitted under paragraph (1) shall read as follows: 'Section 1021(a)(3) of the Congressional Budget and Impoundment Control Act of 1974 shall ____ apply to ____.', with the blank spaces being filled in with—

"(A) in any case in which the Joint Committee on Taxation identifies limited tax benefits in the statement required under subsection (a), the word 'only' in the first blank space and a list of all of the specific provisions of the bill or joint resolution identified by the Joint Committee on Taxation in such statement in the second blank space; or

"(B) in any case in which the Joint Committee on Taxation declares that there are no limited tax benefits in the statement required under subsection (a), the word 'not' in the first blank space and the phrase 'any provision of this Act' in the second blank space.

"(c) PRESIDENT'S AUTHORITY.—If any revenue or reconciliation bill or joint resolution is signed into

law pursuant to Article I, section 7, of the Constitution of the United States—

"(1) with a separate section described in subsection (b)(2), then the President may use the authority granted in section 1021(a)(3) only to cancel any limited tax benefit in that law, if any, identified in such separate section; or

"(2) without a separate section described in subsection (b)(2), then the President may use the authority granted in section 1021(a)(3) to cancel any limited tax benefit in that law that meets the definition in section 1026.

"(d) CONGRESSIONAL IDENTIFICATION OF LIMITED TAX BENEFITS.—There shall be no judicial review of the congressional identification under subsection (a) and (b) of a limited tax benefit in a conference report.".

SEC. 3. JUDICIAL REVIEW.

(a) EXPEDITED REVIEW.—

(1) Any Member of Congress or any individual adversely affected by part C of title X of the Congressional Budget and Impoundment Control Act of 1974 may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution.

(2) A copy of any complaint in an action brought under paragraph (1) shall be promptly delivered to the Secretary of the Senate and the Clerk of the House of Representatives, and each

House of Congress shall have the right to intervene in such action.

(3) Nothing in this section or in any other law shall infringe upon the right of the House of Representatives to intervene in an action brought under paragraph (1) without the necessity of adopting a resolution to authorize such intervention.

(b) APPEAL TO SUPREME COURT.—Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1) of subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 calendar days after such order is entered; and the jurisdictional statement shall be filed within 30 calendar days after such order is entered. No stay of an order issued pursuant to an action brought under paragraph (1) of subsection (a) shall be issued by a single Justice of the Supreme Court.

(c) EXPEDITED CONSIDERATION.—It shall be the duty of the District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under subsection (a).

SEC. 4. CONFORMING AMENDMENTS.

(a) SHORT TITLES.—Section 1(a) of the Congressional Budget and Impoundment Control Act of 1974 is amended by—

(1) striking "and" before "title X" and inserting a period;

(2) inserting "Parts A and B of" before "title X"; and

(3) inserting at the end the following new sentence: "Part C of title X may be cited as the 'Line Item Veto Act of 1996'.".

(b) TABLE OF CONTENTS.—The table of contents set forth in section 1(b) of the Congressional Budget and Impoundment Control Act of 1974 is amended by adding at the end the following:

"PART C-LINE ITEM VETO

"Sec. 1021. Line item veto authority.
"Sec. 1022. Special messages.
"Sec. 1023. Cancellation effective unless disapproved.
"Sec. 1024. Deficit reduction.
"Sec. 1025. Expedited congressional consideration of disapproval bills.
"Sec. 1026. Definitions.
"Sec. 1027. Identification of limited tax benefits.".

(c) EXERCISE OF RULEMAKING POWERS.—Section 904(a) of the Congressional Budget Act of 1974 is amended by striking "and 1017" and inserting ", 1017, 1025, and 1027".

SEC. 5. EFFECTIVE DATES.

This Act and the amendments made by it shall take effect and apply to measures enacted on the earlier of—

(1) the day after the enactment into law, pursuant to Article I, section 7, of the Constitu-

tion of the United States, of an Act entitled "An Act to provide for a seven-year plan for deficit reduction and achieve a balanced Federal budget."; or

(2) January 1, 1997;

and shall have no force or effect on or after January 1, 2005.

Approved April 9, 1996.

Supreme Court, U.S.
FILED
APR 21 1997
CLERK

(8)

No. 96-1671

In the Supreme Court of the United States

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL.,

Appellants,

v.

ROBERT C. BYRD, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM IN RESPONSE TO JURISDICTIONAL STATEMENT

TO BE PRINTED

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April 21, 1997

9 pp

In the Supreme Court of the United States

OCTOBER TERM, 1996

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MEMORANDUM IN RESPONSE TO JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

Appellees agree with the statement of the Questions Presented made by appellants.

PARTIES TO THE PROCEEDINGS

Appellees agree with the statement of the Parties to the Proceedings made by appellants.

ARGUMENT

Appellees agree that the Court should note probable jurisdiction in this case. Because the case presents issues of substantial public importance, appellees have also joined with the Solicitor General in moving the Court to set an expedited schedule for briefing and argument.

To facilitate such expedition, appellees agreed with the Solicitor General to file their response today, one business day after the Jurisdictional Statement was filed. Under the circumstances, appellees will not here answer the extensive arguments set forth in the Jurisdictional Statement in support of appellants' contentions on appeal. Appellees do, however, wish to make four points at this stage about the nature of the issues presented.

1. The Act itself authorizes "[a]ny Member of Congress" to challenge the constitutionality of the Act and commands expedited consideration of any such challenge. 2 U.S.C. § 692(a)(1), (c). It does so because proponents of the Act recognized that it would be born under a constitutional cloud, which they wanted resolved as promptly as possible.[1/] This statutory provision removes all prudential barriers to standing. E.g., Bennett v. Spear, --- U.S. ---, 117 S.Ct. 1154, 1161-62 (1997); Synar v. United States, 626 F. Supp. 1374, 1380 n.3 (D.D.C.)(three-judge court), aff'd, 478 U.S. 714 (1986). The issue, with respect to Member standing, is whether the statutory provision authorizing Members to seek prompt judicial review is constitutional.

1/ E.g., 141 Cong. Rec. S4244 (daily ed. Mar. 21, 1995) (Statement of Senator Exon) ("We do not want that cloud hanging over forever. The [judicial review provision] simply allows a speedy resolution of this constitutional issue. It does not allow a legal challenge to hang over all the [appropriations] bills for years upon years."); 141 Cong. Rec. H1138 (daily ed. Feb. 2, 1995) (statement of Rep. Deal); see also Colloquy of Sen Simon and Sen. McCain, 141 Cong. Rec. S4244-45 (daily ed. Mar. 21, 1995).

2. Although this Court has not resolved the question of the standing of Members of Congress presented in this case, the D.C. Circuit has considered the question extensively and has concluded in a number of cases that a Member of Congress does, like a private plaintiff, have standing if he or she alleges a distinct and palpable injury, traceable to the act complained of, and remediable by the court. E.g., Boehner v. Anderson, 30 F.3d 156, 159-60 (1994); Michel v. Anderson, 14 F.3d 623, 625-26 (1994); Moore v. House of Representatives, 733 F.2d 946, 950-53 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985); Vander Jagt v. O'Neill, 699 F.2d 1166, 1168-71 (D.C. Cir. 1992), cert. denied, 464 U.S. 823 (1983). These decisions are of course not binding on this Court, but they reflect the considered wisdom of a large number of distinguished appellate judges.

In particular, in Moore, supra, Judge Wilkey drew the following critical distinction:

> It is important . . . that the injury claimed here is to the members' rights to participate and vote on legislation in a manner defined by the Constitution. Deprivation of a constitutionally mandated process of enacting law may inflict a more specific injury on a member of Congress than would be presented by a generalized complaint that a legislator's effectiveness is diminished by allegedly illegal activities taking place outside the legislative forum.

733 F.2d at 951. Here, the appellee Members have alleged and asserted by declaration exactly this kind of specific injury to their individual constitutional prerogatives as Members.

As they deliberate and vote on both appropriations bills and other matters, individual Members are directly affected by the markedly enhanced power that the Act gives the President. Proponents as well as opponents recognized that the Act would significantly alter Members' behavior in the conduct of legislative business regarless of whether the item veto was ever exercised. See 141 Cong. Rec. S4076, S4140, S4142, S4221, S4240 (daily ed. Mar. 16, 17, 21,

1995). As appellees' declarations attest, the threat that the President may veto an item desired by an individual Member "hangs over" the Member as he votes "like the sword of Damocles," creating "a 'here-and-now' subservience" to the President "sufficient to raise constitutional questions." Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 264-65 and n.13 (1991) (describing effect of congressional agent's power to veto decisions of airport board of directors). In addition, it prevents Members from reaching compromises on appropriations and other matters, because such compromises can later be undone by item vetoes.[2/]

Moreover, as the district court found, Pet. App. at 11a-12a, whenever an individual Member votes on an appropriation bill, the Act injures the Member by unconstitutionally altering the legal effect of his or her vote. The Act converts each vote on an appropriation bill into a vote on that bill and a whole series of variations, depriving the Member of his or her constitutional right to vote on each bill in its exact final form. Under the Act, a Member considering his or her vote on the "ABC" appropriation bill cannot vote for that bill without by the same action voting to present the President with what he can item-veto into an "AB" bill, a "BC" bill, and every other combination that can be constructed out of items "A", "B", and "C." But a Member who favors "ABC" may not favor "BC" without A (or may simply not have had a chance to study all the possible combinations). Since options have value, the Act, by converting each vote for an appropriations bill into a vote for a "menu" of combinations among which the President may

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[2/] See Declaration of Robert C. Byrd ¶¶ 18, 20-21; Declaration of Mark O. Hatfield ¶ 4; Declaration of Carl Levin ¶¶ 4, 6, 6A; Declaration of David Skaggs ¶¶ 3, 6; Declaration of Henry A. Waxman ¶ 7.

choose, inflicts a concrete injury, each time a vote is taken, on each Member in the exercise of his or her most central power, the power to vote on the passage of legislation.

Appellants note (J.S. 14) that there has not yet been a vote on final passage of an appropriations bill. But it is clearly constitutionally sufficient that an alleged injury be "certainly impending," e.g., Whitmore v. Arkansas, 495 U.S. 149, 158 (1990), and there is no doubt that the plaintiff Members will be called on to vote on appropriations bills in the coming weeks. See Byrd Decl. ¶ 6.

Finally, a Member will be additionally injured when the President item vetoes an item desired by that Member or critical to his or her vote. While appellees are of course correct that this has not yet occurred, the President has expressed an interest in using his veto power promptly, and there is no reason to doubt that he will.[3/]

These are important claims of injury, which cannot be dismissed as mere generic interests, shared with the public at large, in "the operation or outcome of the legislative process" (J.S. 18). Appellees will say more about these matters in their briefs.

3. The stated purpose of the Act is to give the President the line item veto power, and that is precisely what the Act does. It gives the President the power to determine, in conjunction with signing a bill, that some of its provisions will become operative as law and others will not.

The Act is entitled the "Line Item Veto Act of 1996." Its legislative history confirms that Congress intended to empower the President to veto items of discretionary spending, new direct

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[3/] See, e.g., 141 Cong. Rec. S8202-03 (daily ed. June 13, 1995) (containing letter from President to Speaker of the House; "Dear Mr. Speaker: I am writing to urge that Congress quickly complete work on the line-item veto legislation so I can use it -- this year -- to curb wasteful tax and spending provisions"); Statement by the President, Upon Signing S.4 (Apr. 9, 1996).

spending, or limited tax benefits that he disapproves.[4] The Act does precisely that: it authorizes the President to sign a bill and then immediately to strike provisions he disapproves, literally before the ink of his signature is dry. (The Act allows the President to take up to five days for reasons of administrative convenience, but the stated intention was that signing and cancellation take place as promptly as possible, without any intervening event.[5]) The issue on the merits in this case is whether the statutory mechanism Congress invented to give the President the long-sought line item veto power is constitutional.

Article I has long, and almost universally, been read to bar giving the President the line item veto power. President Washington recognized that the Presentment Clause, U.S. Const. Art. I, sec. 7, cl. 2, permits the President only to approve and sign a bill "in toto," or return it in toto, or do nothing, and does not allow him to approve and sign some parts and reject and return others. 33 Writings of George Washington 96 (1940). Later Presidents and their advisors have agreed.[6] The Act sought to evade the "in toto" requirement by providing that the President, after first signing an entire bill, may then strike ("cancel") the provisions he does not like an instant (or

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[4] For example, bills that led to the Act, as reported out in both Houses of Congress, used the words "veto" and "repeal." H.R. 2, 104th Cong. 1st Sess. (1995); S. 4, 104th Cong. 1st Sess. (1995). The Act as adopted uses the word "cancel," but the effect remained the same. See H.R. Conf. Rep. No. 104-491, at 20, 22 (1996).

[5] H.R. Conf. Rep. No. 104-491, at 22 (1996).

[6] See, e.g., 6 James D. Richardson, Messages and Papers of the Presidents 472 (1898) (President Johnson unable to sign only part of a bill into law); 7 id. at 242 (President Grant urging adoption of constitutional amendment in order to achieve the otherwise unachievable item veto); id. at 531-47 (President Hayes, same); William Howard Taft, The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations 11 (1916) (President "has no power to veto parts of the bill and allow the rest to become a law); 22 Weekly Comp. Pres. Doc 1567 (Nov. 14, 1986) (President Reagan unable to sign only part of a bill into law) .

up to five days) later. The question on the merits in this case is whether this statutory mechanism is constitutional.

The answer is no. The Presentment Clause is not "empty formality." Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 958, n.22 (1983). Its purpose is to assure that every enactment, amendment, or repeal of federal statutory law has been passed by both Houses of Congress in its exact final form and then either "approve[d]" and signed in toto by the President or adopted in toto without his signature or over his veto in the manner the Clause prescribes. The Act violates that requirement. It authorizes the President to sign a bill even if he will strike 5% or 95% of its provisions an instant later, so that the President's signature no longer signifies his approval of the whole Act as one he will faithfully execute. And in authorizing the President to "cancel" the provisions he does not like, the Act gives him an unconstitutional unilateral power of repeal:[7] "cancel" is defined to mean "rescind" or "prevent . . . from having legal force or effect," and every cancellation is permanent and irrevocable.[8]

4. Appellants argued below and reassert in this Court that the Act merely gives the President "discretion" not to spend appropriated amounts. But the Act is nothing like a typical delegation of executive authority. It gives the President a one-time, irreversible, and virtually unconstrained opportunity at signing to strike any spending provision he thinks is not "essential,"

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[7] As Chadha made clear, "Amendment and repeal of statutes, no less than enactment, must conform with Art. I." 462 U.S. at 954.

[8] Appellants note that the Act provides for "disapproval bills" by which the Congress may override an item veto. That provision does not affect the constitutional question presented. A "disapproval bill" is a new law, which must be enacted with the President's signature or over his veto in the traditional manner. The Act merely provides for expediting its consideration. The significance of the disapproval bill provision for present purposes is that it demonstrates that a "canceled" provision is entirely dead.

2 U.S.C. § 691(a)(A)(ii). The Act's purpose is to give the President the line item veto power -- a step, as the District Court put it, that "give[s] away the power to shape the content of a statute of the United States," Pet. App. at 25a.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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April 21, 1997

(9)

No. 96-1671

In the Supreme Court of the United States

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL., APPELLANTS

v.

ROBERT C. BYRD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED: APRIL 18, 1997
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110 pp

TABLE OF CONTENTS

	Page
District Court Docket Entries	1
Complaint for Declaratory Relief	9
District Court Index of Legislative History Materials	16
Declarations of Senator Robert C. Byrd, Senator Mark O. Hatfield, Senator Carl Levin, Senator Daniel Patrick Moynihan, Representative David Skaggs and Representative Henry A. Waxman	21
Declaration of Senator Robert C. Byrd	23
Declaration of Mark O. Hatfield	38
Declaration of Carl Levin	41
Declaration of Senator Daniel Patrick Moynihan	47
Declaration of David Skaggs	57
Declaration of Henry A. Waxman	61
Plaintiffs' Motion for Leave to File Legislative Summary	65
Legislative Summary	67
Letter to Robert Dole dated September 11, 1995 from Alice M. Rivlin, Director of Office of Management and Budget	91
Plaintiffs' Statement of Material Facts as to Which There is no Genuine Issue	94
Defendants' Statement of Genuine Issue	102
Statement of Material Facts as to Which Defendant's Contend There is No Genuine Issue	104
Plaintiffs' Response to Defendants' Statement of Material Facts as to Which Defendants' Contend There is No Genuine Issue	106
Order in Pending Case	108

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. 97-CV-1

SENATOR ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE		PROCEEDINGS
1997		
Jan. 2	(1)	COMPLAINT filed by plaintiff ROBERT C. BYRD, plaintiff MARK O. HATFIELD, plaintiff CARL LEVIN, plaintiff DANIEL PATRICK MOYNIHAN, plaintiff DAVID E. SKAGGS, plaintiff HENRY A. WAXMAN (kmk) [Entry date 01/03/97]
2	(—)	SUMMONS (4) issued to federal party(s) defendant FRANKLIN D. RAINES, defendant ROBERT E. RUBIN, and non-parties: U.S. Attorney and U.S. Attorney General. (kmk) [Entry date 01/03/97]

DATE		PROCEEDINGS
2	(2)	MOTION filed by plaintiff ROBERT C. BYRD, plaintiff MARK O. HATFIELD, plaintiff CARL LEVIN, plaintiff DANIEL PATRICK MOYNIHAN, plaintiff DAVID E. SKAGGS, plaintiff HENRY A. WAXMAN to expedite this action, and for a scheduling hearing on 1/6/97 or as soon as possible at the Court's convenience (kmk) [Entry date 01/03/97]
3	(3)	RESPONSE by defendant FRANKLIN D. RAINES, defendant ROBERT E. RUBIN to motion to expedite this action [2-1] by plaintiffs, motion for a scheduling hearing on 1/6/97 or as soon as possible at the Court's convenience [2-2] by plaintiffs; attachment (1). (tth) [Entry date 01/06/97]
6	(—)	STATUS HEARING before Judge Thomas P. Jackson, Plaintiff to file motion for summary judgment by 1-27-97, defendant to reply to Plaintiffs motion for summary judgment by 2-26-97, plaintiff to reply by 3-7-97 and defendant to reply by 3-14-97, motion hearing set for 10:00 3/21/97; Reporter: P.Merana (rew)

DATE	PROCEEDINGS
6 (4)	REPLY by plaintiffs to response to motion to expedite this action [2-1] by plaintiffs (tth) [Entry date 01/07/97]
6 (5)	ORDER by Judge Thomas P. Jackson: granting motion to expedite this action [2-1] by plaintiff, defendants to file motion to dismiss by 1-16-97, plaintiffs motion for summary judgment and response to defendants motion to dismiss by 1-27-97, defendants reply to their motion to dismiss and response to plaintiffs motion for summary judgment and intervenors or amici supporting defendant motion due 2/26/97, plaintiffs reply to their motion for summary judgment and response to defendant cross motion if any by 3/7/97, and if defendants have cross-moved for summary judgment defendants shall file brief in support by 3/14/97, and setting motion hearing for 3/21/97 at 10:00 am. (N) (rew) [Entry date 01/07/97] [Edit date 03/19/97]
16 (6)	MOTION filed by defendant FRANKLIN D. RAINES, defendant ROBERT E. RUBIN to dismiss complaint [1-1] for lack of jurisdiction (tth) [Entry date 01/17/97]

DATE		PROCEEDINGS
	27 (7)	NOTICE OF FILING by plaintiffs of Legislative History Materials; Volumes (3) (tth)
	27 (8)	MOTION filed by plaintiffs for summary judgment; attachments (3); declarations (6). (tth) [Entry date 01/28/97] [Edit date 01/28/97]
	27 (9)	MEMORANDUM by plaintiffs in opposition to motion to dismiss complaint [1-1] for lack of jurisdiction [6-1] by ROBERT E. RUBIN, FRANKLIN D. RAINES (tth) [Entry date 01/28/97]
	27 (10)	MOTION filed by plaintiffs for leave to file Legislative Summary; EXHIBIT (LEGISLATIVE SUMMARY) (tth) [Entry date 01/28/97]
Feb. 3	(11)	ORDER by Judge Thomas P. Jackson: granting motion for leave to file Legislative Summary [10-1] by plaintiff, and directing the clerk to accept the summary for filing. (N) (rew) [Entry date 02/04/97]

DATE	PROCEEDINGS
26 (12)	MOTION filed by federal defendant FRANKLIN D. RAINES, federal defendant ROBERT E. RUBIN for summary judgment (tth) [Entry date 02/28/97]
26 (13)	REPLY by federal defendant FRANKLIN D. RAINES, federal defendant ROBERT E. RUBIN to response to motion to dismiss complaint [1-1] for lack of jurisdiction [6-1] by ROBERT E. RUBIN, FRANKLIN D. RAINES (tth) [Entry date 02/28/97]
26 (14)	MOTION filed by movant UNITED STATES SENATE, movant BIPARTISAN LEGAL for leave to appear as amici curiae; attachment (1); EXHIBIT (MEMORANDUM OF THE US SENATE AND BIPARTISAN LEGAL GROUP IN SUPPORT OF THE CONSTITUTIONALITY OF THE LINE ITEM VETO ACT) (tth) [Entry date 02/28/97]

* * * * *

DATE		PROCEEDINGS
26	(16)	RESPONSE by federal defendant FRANKLIN D. RAINES, federal defendant ROBERT E. RUBIN in opposition to motion for summary judgment [8-1] by plaintiffs. (tth) [Entry date 03/10/97]
Mar. 7	(15)	RESPONSE by plaintiffs in opposition to motion for summary judgment [12-1] by ROBERT E. RUBIN, FRANKLIN D. RAINES. (tth) [Entry date 03/10/97]
7	(17)	REPLY by plaintiffs to response to motion for summary judgment [8-1] by plaintiffs (tth) [Entry date 03/ 10/97]
7	(18)	RESPONSE by plaintiffs to defendants' statement of material facts as to which defendants' contend there is no genuine issue [12-1] by ROBERT E. RUBIN, FRANKLIN D. RAINES (tth) [Entry date 03/10/97]
14	(19)	REPLY by federal defendant FRANKLIN D. RAINES, federal defendant ROBERT E. RUBIN to response to motion for summary judgment [12-1] by ROBERT E. RUBIN, FRANKLIN D. RAINES (tth) [Entry date 03/17/97]

DATE	PROCEEDINGS
18 (20)	ORDER by Judge Thomas P. Jackson: granting motion for leave to appear as amici curiae [14-1] by BIPARTISAN LEGAL, UNITED STATES SENATE (N) (rew) [Entry date 03/19/97]
18 (21)	JOINT NOTICE OF FILING by plaintiff, federal defendant, movant of proposed time allocations for oral argument. (kmk) [Entry date 03/ 19/97]
18 (22)	MEMORANDUM by movant UNITED STATES SENATE, movant BIPARTISAN LEGAL in support of the United States House of Representatives as amici curiae in support of the Constitutionality of the Line Item Veto Act (tth) [Entry date 03/20/97]
18 (23)	REPLY by movant UNITED STATES SENATE, movant BIPARTISAN LEGAL to memorandum in support of the Costitutionality of the Line Item Veto Act [22-1] by BIPARTISAN LEGAL, UNITED STATES SENATE; "Let this be filed", JACKSON, J. (tth) [Entry date 03/20/97]

DATE		PROCEEDINGS
20	(—)	SCHEDULING NOTICE: motion hearing set for 9:30 3/21/97; before Judge Thomas P. Jackson. (rew)
21	(—)	MOTION HEARING before Judge Thomas P. Jackson, defendants motion to dismiss and cross motions for summary judgment heard and taken under advisement. Reporter: P. Merana (rew)
Apr. 7	(24)	TRANSCRIPT of proccedings before Judge Thomas P. Jackson filed for date(s) of 3/21/97. Reporter: Phyllis Merana (kmk)
10	(25)	MEMORANDUM AND ORDER by Judge Thomas P. Jackson: denying motion for summary judgment [12-1] by ROBERT E. RUBIN, FRANKLIN D. RAINES, granting motion for summary judgment [8-1] by plaintiffs, denying motion to dismiss complaint [1-1] for lack of jurisdiction [6-1] by ROBERT E. RUBIN, FRANKLIN D. RAINES, and directing the Line Item Veto Act is declared unconstitutional. (N) (N) (rew)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:97CV0001

SEN. ROBERT C. BYRD
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WASHINGTON, DC 20510

SEN. MARK O. HATFIELD
711 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510

SEN. CARL LEVIN
459 RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510

SEN. DANIEL PATRICK MOYNIHAN
464 RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510

REP. DAVID E. SKAGGS
1124 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20510

REP. HENRY A. WAXMAN
2204 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20510, PLAINTIFFS

v.

FRANKLIN D. RAINES,
DIRECTOR OF THE OFFICE OF
MANAGEMENT AND BUDGET
ROOM 252
OLD EXECUTIVE OFFICE BUILDING
WASHINGTON, DC 20503

ROBERT E. RUBIN,
SECRETARY OF THE TREASURY
15TH STREET AND PENNSYLVANIA AVENUE
WASHINGTON, DC 20220, DEFENDANTS

[FILED: JAN. 2, 1997]

COMPLAINT FOR DECLARATORY RELIEF

1. On April 9, 1996, President Clinton signed into law Pub. L. No. 104-130, 110 Stat. 1200 ("the Act"). The Act, which refers to itself as the Line Item Veto Act, became effective on January 1, 1997. The Act gives the President the authority to "cancel in whole," at any time up to five days (excluding Sundays) after signing a bill into law, any dollar amount of appropriation, any item of new direct spending, or any limited tax benefit contained in the bill. In this action, plaintiffs, who are six Members of Congress, assert that the Act confers on the President powers of veto, revision, and repeal of federal law that violate Article I of the Constitution.

Jurisdiction and Venue

2. This Court has subject matter jurisdiction pursuant to 2 U.S.C. § 692(a)(1) and 28 U.S.C. § 1331.

3. This Court may enter a declaratory judgment under 2 U.S.C. § 692(a)(1) and 28 U.S.C. § 2201.

4. Venue in this Court is proper pursuant to 2 U.S.C. § 692(a)(1).

Parties

5. Plaintiff Robert C. Byrd is a Senator from the State of West Virginia and a duly elected member of the 105th Congress. Senator Byrd's current term of service will expire on January 3, 2001.

6. Plaintiff Mark O. Hatfield is a Senator from the State of Oregon. Senator Hatfield has represented the State of Oregon for five consecutive terms, beginning in 1967. His term of service will expire, and he will retire from the Senate, at noon, January 3, 1997.

7. Plaintiff Carl Levin is a Senator from the State of Michigan and a duly elected member of the 105th Congress. Senator Levin's current term of service will expire on January 3, 2003.

8. Plaintiff Daniel Patrick Moynihan is a Senator from the State of New York and a duly elected member of the 105th Congress. Senator Moynihan's current term of service will expire on January 3, 2001.

9. Plaintiff David E. Skaggs is a Representative from the Second Congressional District of Colorado and a duly elected member of the 105th Congress.

10. Plaintiff Henry A. Waxman is a Representative from the Twenty-Ninth Congressional District of California and a duly elected member of the 105th Congress.

11. Defendant Franklin D. Raines is the Director of the Office of Management and Budget, sued in his official capacity. In his official capacity, defendant Raines is responsible for executing the President's cancellations of budgetary and spending authority under the Act.

12. Defendant Robert E. Rubin is the Secretary of the Treasury, sued in his official capacity. In his official capacity, defendant Rubin is responsible for executing the President's cancellations of "limited tax benefits" under the Act and for executing and enforcing the tax laws of the United States.

The Line Item Veto Act

13. The Act provides that the President may, immediately, or within five calendar days (excluding Sundays), after signing a bill into law pursuant to Article I, section 7, of the Constitution, "cancel" any dollar amount of "discretionary budget authority (i.e., appropriations), any item of new direct spending, or any "limited tax benefit" contained in that law. The Act defines "cancel" to mean "rescind" in the case of an appropriation, and "prevent . . . from having legal force or effect" in all other cases. With respect to appropriations, the Act permits the President to cancel any amount stated in the law itself and also any amount separately stated in any table, chart, or explanatory text in the statement of managers or in any governing committee report accompanying the law. The Act requires that the President determine that the cancellation will reduce the Federal budget deficit, will not impair government functions he deems "essential," and will not "harm the national interest," but the Act does not require any other determination.

Injuries

14. The Act directly and concretely injures the plaintiffs, in their official capacities, by (a) altering the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divesting the plaintiffs of their constitutional role in the repeal of legislation, and (c) altering the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress.

Claim for Relief

15. The Act grants the President the power to cause some parts of a bill that has passed both Houses of Congress and been signed by him to be law, while canceling other parts of the bill and returning them to Congress. The Act grants this authority by permitting the President to sign a bill and then instantly (or within 5 days) and unilaterally negate the legal effect of his signature with respect to some parts of the bill by signing and transmitting a message to the Congress canceling those parts. Whether the Act is viewed as granting the President a unilateral power of line-item revision of bills that have been presented for his signature, or as granting him a unilateral power to repeal portions of duly enacted laws, the Act grants powers to the President that contravene the constitutional process for making federal law.

16. Article I of the Constitution provides a "single, finely wrought and exhaustively considered procedure," *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983), for making or changing federal law. It vests all federal legislative powers in a Congress comprised of two Houses. It requires that any bill must pass by majority vote in both the House and the Senate before it may become a law. The Presentment Clause (Art. I, sec. 7, cl. 2) then requires that a bill, before it becomes a law, shall be presented to the President, and it gives the President only three choices with respect to a bill presented to him: to "approve" the whole bill and sign it; to "return" (i.e., veto) the whole bill; or to allow the whole bill to become law without his signature. The requirement of bicameral passage and presentment to

the President applies to the repeal, as well as enactment or amendment, of provisions of law.

17. The Act violates Article I. The Act unconstitutionally expands the President's power, with respect to certain bills presented to him, by authorizing him to "approve" a bill and sign it into law and, from an instant up to five days later, disapprove and "return" parts of the bill, so that the parts of the bill disapproved by the President do not have the force and effect of law. The Act also violates the requirements of bicameral passage and presentment by granting to the President, acting alone, the authority to "cancel" and thus repeal provisions of federal law.

Prayer for Relief

Wherefore plaintiffs pray

(1) For a declaratory judgment that the Act is unconstitutional and that any cancellations under the Act are invalid.

(2) For reimbursement of their costs in this action, and for such other relief as the Court may deem appropriate.

Respectfully submitted,

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MICHAEL A. CARVIN
(DC Bar No. 366784)

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/s/ LOUIS R. COHEN
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Date: January 2, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001(TPJ)

SEN. ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

INDEX OF LEGISLATIVE HISTORY MATERIALS

Plaintiffs hereby lodge with the Court the following legislative materials all of which are public documents.

Bills

1. H.R. 2, 104th Cong., 1st Sess. (1995)
2. S. 4, 104th Cong., 1st Sess. (1995)
3. S. 14, 104th Cong., 1st Sess. (1995)

Reports

4. H.R. Rep. No. 11, 104th Cong., 1st Sess. (Jan. 27, 1995)(Part 1)
5. H.R. Rep. No. 11, 104th Cong., 1st Sess. (Jan. 30, 1995)(Part 2)
6. S. Rep. No. 9, 104th Cong., 1st Sess. (1995)
7. S. Rep. No. 10, 104th Cong., 1st Sess. (1995)
8. S. Rep. No. 13, 104th Cong., 1st Sess. (1995)
9. S. Rep. No. 14, 104th Cong., 1st Sess (1995)
10. H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. (1996)

Hearings

11. *Line-Item Veto: Joint Hearing Before the Comm. on Gov. Reform and Oversight, House of Reps. and Comm. on Gov. Affairs, Senate*, 104th Cong., 1st Sess. (Jan. 12, 1995)
12. *Line-Item Rescission Authority: Hearing on S. 4 and S. 14 Before The Comm. on the Budget*, 104th Cong., 1st Sess. (Jan. 18, 1995)
13. *The Line-Item Veto: A Constitutional Approach, Hearing Before the Subcomm. on the Constitution, Federalism and Property Rights of the Comm. on the Judiciary*, No. 478, 104th Cong., 1st Sess. (Jan. 24, 1995)
14. *S. 4 and S. 14, Line Item Veto, Hearing Before the Comm. on Gov. Affairs*, No. 391, 104th Cong., 1st Sess. (Feb. 23, 1995)

Floor Consideration

15. 141 Cong. Rec. S.173-76 (Jan. 4, 1995) (daily ed.)
16. 141 Cong. Rec. S.692 (Jan. 10, 1995) (daily ed.)
17. 141 Cong. Rec. H.1078-1142 (Feb. 2, 1995) (daily ed.)
18. 141 Cong. Rec. H.1168-91 (Feb 3, 1995) (daily ed.)
19. 141 Cong. Rec. H.1225-64 (Feb. 6, 1995) (daily ed.)
20. 141 Cong. Rec. S.4002, 4004, 4074-89 (Mar. 16, 1995) (daily ed.)
21. 141 Cong. Rec. S.4125-45 (Mar. 17, 1995) (daily ed.)
22. 141 Cong. Rec. S.4153-96 (Mar. 20, 1995) (daily ed.)

23. 141 Cong. Rec. S.4212-60 (Mar. 21, 1995) (daily ed.)
24. 141 Cong. Rec. S.4295-4358 (Mar. 22, 1995) (daily ed.)
25. 141 Cong. Rec. S.4409-87 (Mar. 23, 1995) (daily ed.)
26. 141 Cong. Rec. S.4522-23 (Mar. 23, 1995) (daily ed.)
27 141 Cong. Rec. S.4529 (Mar. 24, 1995) (daily ed.)
28. 141 Cong. Rec. S.4544-4545 (Mar. 24, 1995) (daily ed.)
29. 141 Cong. Rec. S.4598-4599 (Mar. 24, 1995) (daily ed.)
30. 141 Cong. Rec. S.8717-19 (Mar. 24, 1995) (daily ed.)
31. 141 Cong. Rec. S.4601 (Mar. 24, 1995) (daily ed.)
32. 141 Cong. Rec. H.3740 (March 24, 1995) (daily ed.)
33. 141 Cong. Rec. H.5090-97 (May 17, 1995) (daily ed.)
34. 141 Cong. Rec. S.8201-03 (June 13, 1995) (daily ed.)
35. 141 Cong. Rec. S.8717-19 (June 20, 1995) (daily ed.)
36. 141 Cong. Rec. S.10331-33 (July 20, 1995) (daily ed.)
37. 141 Cong. Rec. S.10916-18 (July 31, 1995) (daily ed.)
38. 141 Cong. Rec. H.8605-08 (Sept. 7, 1995) (daily ed.)
39. 141 Cong. Rec. H.10773-79 (Oct. 25, 1995) (daily ed.)
40. 141 Cong. Rec. S.2925 (Mar. 27, 1996) (daily ed.)
41. 141 Cong. Rec. S.2929-95 (Mar. 27, 1996) (daily ed.)

42. 141 Cong. Rec. S.3026-29 (Mar. 27, 1996) (daily ed.)
43. 141 Cong. Rec. S.3150-51 (Mar. 28, 1996) (daily ed.)
44. 141 Cong. Rec. H.2971-3028 (Mar. 28, 1996) (daily ed.)

President's Signing Statement

45. Statement by President William J. Clinton, Upon Signing S.4 (Apr. 9, 1996).

Respectfully submitted,

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Counsel for Plaintiffs

Date: January 27, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET. AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET. AL., DEFENDANTS

DECLARATIONS OF SENATOR ROBERT C. BYRD, SENATOR MARK O. HATFIELD, SENATOR CARL LEVIN, SENATOR DANIEL PATRICK MOYNIHAN, REPRESENTATIVE DAVID SKAGGS AND REPRESENTATIVE HENRY A. WAXMAN

Pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, plaintiffs hereby submit the declarations of Senator Robert C. Byrd, Senator Mark O. Hatfield, Senator Carl Levin, Senator Daniel Patrick Moynihan, Representative David Skaggs, and Representative Henry A. Waxman.

Respectfully submitted,

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Counsel for Plaintiffs

Date: January 27, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET. AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET. AL., DEFENDANTS

DECLARATION OF SENATOR ROBERT C. BYRD

Robert C. Byrd hereby deposes and says pursuant to 28 U.S.C. § 1746:

1. I am a United States Senator from West Virginia and one of the plaintiffs in this action.

The Basis of My Statements

2. My service in the Congress began in the House of Representatives on January 3, 1953. After six years in the House I was elected to the United States Senate in 1958, for a term beginning on January 3, 1959. I have been reelected to the Senate six times, most recently in 1994, for a term that will expire on January 3, 2001. From the beginning of my service in the Senate until the adjournment sine die of the 104th Congress last October, I cast 14,584 recorded votes, many of which were on appropriations and other matters now governed by the Line Item Veto Act.

3. I have been a member of the Senate Committee on Appropriations since January 14, 1959. I have

chaired or have been the ranking minority member of subcommittees of the Committee on Appropriations. I chaired the full committee from 1989 through 1994, and I have been its ranking minority member since 1995. As a member of the committee, as a subcommittee chairman and as a subcommittee ranking minority member, and as chairman and as the ranking minority member of the full committee, I have participated in the process of achieving compromises within the Senate, between the Senate and the House, and with Presidents, a process that is fundamental to governance under our Constitution.

4. I have also been a leader in the United States Senate. Between 1967 and 1971 I served as Secretary of the Democratic Conference. From January 1971 through 1976 I served as the Democratic whip. I was the Senate majority leader from January 1977 through 1980, and again from January 1987 through 1988. I was the Senate minority leader from January 1981 through 1986. As a member of my party's leadership for 22 years I observed and participated in building and maintaining through compromise the coalitions of Members that are essential to legislation by multi-member Houses in a bicameral Congress. These observations were confirmed and strengthened by my experience in presiding over the Senate as its President pro tempore from January 1989 through 1994.

5. In addition to basing this declaration on these legislative experiences, there are four fundamental aspects of our Constitution which inform the judgments that I will describe.

First, representation in the Senate is based on the equality of each State of our Union. I, for example, represent a small state that lacks the population and wealth of many other states, but stands equal in the Senate to every other state. I am accordingly mindful, when I evaluate legislation that departs from the design of our Constitution, as I understand it, of the impact of a measure such as the Line Item Veto Act on my ability to protect the interests of my state and other small states in the manner in which I believe that the Framers intended.

Second, the Framers created a bicameral system in which the Senate, in contrast to most second chambers elsewhere, shares in the power to originate legislation (except for bills to raise revenue) and possesses the power to amend all legislation. This feature of the Senate deepens my concern about any legislation that would give to a President the ability to disassemble legislation by preferring, through the power of cancellation, the amendments of one House over the other.

Third, the Senate shares with the President, and is the only independent check upon, both the appointment power and the treaty power. There is a seamlessness in the Constitution's balance of power which means that a constitutional imbalance in the appropriations process, which in my judgment will result from the Line Item Veto Act, inevitably will imbalance other carefully proportioned relationships established by the Framers.

Finally, with particular regard to appropriations, my experience in both chambers has continually augmented my respect for the force of James Madison's observation, in Federalist No. 58, that the "power

over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." Because of the damage that the Act causes to the constitutional design for the enactment of appropriations legislation, I will focus in this declaration on that feature of the Act.

The Application of the Act to Appropriations

6. In the following five paragraphs, I will describe how the Line Item Veto Act applies to appropriations.

7. First, to have the authority to cancel an appropriation (which the Act describes as any dollar amount of discretionary budget authority) the President must first sign an appropriation bill or joint resolution into law. This requirement appears in section 1021 of the Congressional Budget and Impoundment Control Act of 1974, as added by the Line Item Veto Act. The President loses this new cancellation power if he exercises his right to veto a bill and if that veto is overridden, or exercises the right to allow a bill to become law after ten days (Sundays excepted) without his signature. I am principally concerned about the damage that the Act causes to the role of the Congress in the legislative process. But I also addressed the Senate about what I described, and believe, to be this "very peculiar feature of the law," which, as I told the Senate "puts some pressure on a President not to exercise his constitutional right of veto which is set forth in section 7 of article I of the Constitution of the United States." In my view, this will make the President "a

super legislator. It will discourage him from using his veto powers to veto an entire bill, and encourage him to try to 'fix' legislation with which he does not fully agree by canceling only portions of the bill." Congressional Record, 104th Cong., 2d Sess., p. S2944 (March 27, 1996). The damage which the Act causes to the constitutional role of the Congress, and its Members, is thus not the only damage it causes to our constitutional system. In this regard, I also spoke (at, for example, pages S2943 and S2944 of that day's Record) and have considerable concern about the impact on the independence of the Judiciary of the Executive's power to single out for cancellation appropriations to that Branch.

8. The President is given five days (excluding Sundays) to send a message to Congress which by itself, without approval of the Congress, cancels an appropriation that fleetingly appeared to have become law. At page 22 of their report, the conferees on the Act described their intention "that the President's cancellations be made as soon as possible after the enactment of the law," referring to appropriations and other laws that would be subject to cancellations. They advised the Congress that the sole purpose of the five day period is to enable the Administration to prepare the paperwork that must be submitted to the Congress. There is no intention, or time, for the President to gain any experience or insights in the course of implementing an appropriation. The procedure of the Act ensures that the President acts only on the basis of his disagreement with portions of a bill as it was presented to him. There are, of course, important occasions when the Congress calls upon the President, in a law that it enacts, to make judg-

ments about facts that occur after the law has been passed. In the area of foreign policy, we often want the President to be able to respond to new facts which he learns through his ambassadors and other sources of information. There are times in which we also confer on the President flexibility to respond to changing economic events. But we have never to my knowledge given to the President, and I believe cannot by simple law do so consistent with the Constitution, a power, over and above his constitutional veto power, to nullify our Acts or portions of them for the sole reason that he disagrees with them.

9. Section 1026(7) defines the phrase "dollar amount of discretionary budget authority," which is of great importance in understanding the reach of the President's new power to cancel appropriations. Not surprisingly for an act that is entitled a Line Item Veto Act, the first element of the definition includes the entire dollar amount of budget authority specified in an appropriation law. It also includes amounts required to be allocated by a specific provision in an appropriation law even in the absence of a specific dollar figure in the law.

10. That, however, is only part of the President's new cancellation power. Section 1026(7) (A) (ii) also empowers the President to reach into congressional committee documents that are never presented to any President and cancel amounts "represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying such law." At page 32 of their report, the conferees on the Act candidly explained that through this provision "Congress is choosing to use those documents as a means of

allowing the President increased discretion to reduce dollar amounts of discretionary budget authority provided in an appropriation law." But, as I described to the Senate (at page S2939 of the Congressional Record for March 27, 1996), a "bill goes to the President for his signature or veto. This conference report does not go. He never sees it." The committee provision allows administration officials to advise our Chief Executive, " 'Mr. President, there is a chart in the conference report on page 27, and you will find in that chart a certain item for certain States or certain regions of the country,' and he can say, 'Rescind them.' "

11. There is more. For example, as the conferees noted at page 33 of their report, the definition section of the Act enables the President to "look through" an appropriation law to an authorization law that mandates an expenditure. Thus, under section 1026(7)(A)(iii) of the Act, the President effectively may nullify authorization acts as well as appropriation acts by canceling budget authority "required to be allocated for a specific program, project, or activity in a law (other than an appropriation law) that mandates the expenditure of budget authority from accounts, programs, projects, or activities for which budget authority is provided in an appropriation law."

12. The President can also effectively nullify authorization acts by any cancellation that causes the zero funding of any project, program, or even department of the Government, and the cancellations may reach into any Branch, including the Legislative and Judicial Branches. What is at stake here is potentially far more than whether a particular dam or bridge is economically justified, or may be achieved

more frugally, although such issues may arise and be of great significance to the communities involved. Rather, the stake here also includes fundamental policy debates, which could range (looking at contemporary examples) from missile defense to legal services for the poor, in which a presidential cancellation power will enable one President or another to negate or rewrite underlying legislative policy.

13. Once the President acts the appropriation is canceled. The President's power of negation under the Act is even stronger than the qualified negative given by the Framers to the President under the Constitution, because at least under the Constitution only one formidable step, obtaining a two-thirds vote in each House on a returned bill is required to repass it. Instead, under the Act the Congress must act twice, first passing new legislation to disapprove the President's cancellation, and then overriding the President's veto of the disapproval bill. Based on all my experience, I believe that, except in rare circumstances, the Act gives to the President the functional equivalent of an absolute veto power.

The Budget Calendar for 1997

14. In the next three paragraphs, I will describe the formal budget calendar for 1997, indicating in general the variations to which it is subject, as a predicate for my judgment that the Act will have a significant impact in advance of the President's use of it to cancel any appropriation.

15. Section 300 of the Congressional Budget Act of 1974 establishes this timetable for the congressional budget process in a fiscal year:

On or before:	Action to be completed:
First Monday in February	President submits his budget.
February 15	Congressional Budget Office submits report to the Budget Committees.
February 25	Committees submit views and estimates to Budget Committees.
April 1	Senate Budget Committee reports concurrent resolution on the budget.
April 15	Congress completes action on concurrent resolution on the budget.
May 15	Annual appropriation bills may be considered in the House.
June 10	House Appropriations Committee reports last annual appropriation bill.
June 15	Congress completes action on reconciliation legislation.
June 30	House completes action on annual appropriation bills.
October 1	Fiscal year begins.

The actual timing of events preceding the beginning of the new fiscal year is subject to some variation, including importantly the congressional

timetable for reconciliation legislation, which may include direct spending and tax matters.

16. The annual work of the Committees on Appropriations, in 1997 as in previous years, will begin in earnest when the President's budget, with supporting agency justifications, is submitted to Congress. The President's budget is now due to be submitted by February 6, 1997. Subcommittees of the two Committees on Appropriations will begin full hearing schedules in February to hear testimony from departmental and agency officials. The timing of the annual congressional budget resolution will then have an important bearing on the precise steps that follow. The budget resolutions, among other matters, will set aggregate spending—ceilings for budget authority and outlays, and distribute that authority among 19 functional categories. The annual resolutions will also distribute total budgetary authority among committees of jurisdiction in the two Houses, including the Senate and House Committees on Appropriations. With those allocations, the two appropriations committees will distribute budget authority and outlays among their subcommittees, and the process of marking up appropriations bills will begin. Floor activity will begin in the House in May and June, and may extend into July. Formal Senate activity (building on months of preparation) in marking up bills will begin when they are received from the House. Thus, by late spring and certainly by early summer, votes will be cast first at the committee level in each House, and then on the floors of the two chambers. Some conference committees to reconcile the bills of the two Houses may meet and report prior to the Congress' August recess. In the

main they will meet and report throughout September, during which month votes on final passage of appropriations bills will occur in both chambers in order to complete action, when possible, before the beginning of the fiscal year on October 1.

17. Well before October 1, recent appropriations history indicates that probably as early as March or April of this year, the Congress is expected to act on supplemental appropriations. Thus Members will quite soon begin to cast votes on legislation governed by the Line Item Veto Act.

Injuries Caused By the Line Item Veto Act

18. In my judgment, the Line Item Veto Act will significantly alter the meaning of the votes that I and other Members of the Senate, and also of the House, will cast on the final passage of appropriation bills. It has always been the case, on votes preliminary to final passage, that Members of Congress understand that the shape of a final bill is subject to further consideration, perhaps within the Members' respective chambers, or in negotiations between the two Houses, which may include negotiations with the Administration over whether the President will exercise a veto under Article I, section 7 of the Constitution. But a vote on final passage of a measure, for example a conference report on an appropriations bill, is different. Until the Line Item Veto Act, votes on final passage have not been steps in negotiations but rather acts of constitutional significance. For Members voting in the affirmative, that vote had previously entailed an action, by each supporting Member and by that Member's chamber, which enabled each and every element of that bill to become a

law, not because every Member necessarily endorsed each element of it, but because the totality of the bill warranted affirmation. Thus, in casting their votes on final passage, Members often have accepted provisions with which they disagree, in the interest of securing passage of provisions that they support. The Line Item Veto Act alters the meaning of final votes, because each of them is subject to the President's power to refashion the final product in a way that no longer reflects the totality of the bill upon which the votes of Members had been predicated. With the Line Item Veto Act, Members will be voting on bills the final contents of which will be determined by presidential action subsequent to their votes.

19. Consequently, whenever a bill containing one or more items subject to presidential cancellation under the Act is presented for a vote on final passage in the Senate, the Act changes the discharge of my constitutional responsibilities and the legal effect of my vote:

a. Under the Constitution, prior to January 1, 1997, whenever I voted for a bill, I knew that my vote could be counted only toward having that exact bill be law, with all of its provisions and only those provisions, and that if it passed the House and Senate it would have operative effect as law only in exactly the form in which I voted for it. If any revision whatsoever were made in the bill after I voted, the revised bill could not become law without passing the Senate in the revised form, and I would have another opportunity to consider the bill and cast a vote.

b. Under the Act, however, whenever I vote for a bill that contains any item subject to presidential cancellation, I am no longer voting for the whole bill

and only that bill. I am voting, instead, to give the President a menu from which he may choose the items that will have operative effect as law and the items that will not. I am no longer exercising the judgment that I believe the Constitution calls on me to exercise: whether the whole bill is in the best interests of the Nation.

c. These changes in the nature of the decision I am required to make in deciding how to vote, and in the legal effect of what I have done when I cast a vote, will occur early and throughout this and subsequent sessions of Congress each of the many times that I vote on passage of a bill with vetoable items.

20. Because the Act profoundly alters the meaning of final votes, the Act will markedly encumber the process of compromise, a process that is fundamental to the functioning of a bicameral legislature consisting of two Houses composed according to different electoral principles. Until the Line Item Veto Act, every Member or state delegation within the two Houses, could be assured of the durability of their compromises on final passage, at least until the Congress reconsidered a bill if it was returned by the President. Also, the fundamental precept that produced the Great Compromise between populous and small states at the Constitutional Convention—that the Senate would be composed on the principle of equality of states, and that no legislation may be completed absent the concurrence of the two Houses to the same Act—is endangered by the President's unilateral power to reformulate legislation. This will especially burden the small States whose limited membership in the House will place them at a special

disadvantage in securing the passage of disapproval legislation.

21. The Act will have an impact even prior to the casting of votes on final passage of appropriations legislation. By fundamentally changing the ground rules for the enactment of legislation, the Act introduces a new element in the relationship of governmental powers, beyond the need of Members to obtain a majority within a House, or of their House to obtain bicameral agreement, or of the Congress to obtain the President's approval of a statute as a whole. This new element is the power of the Executive to shape appropriations legislation through the potential of applying the cancellation authority. Furthermore, the object of that power need not be limited to appropriations, as it just as likely that the Executive's new authority over spending and taxes may be used to secure approval of appointments, treaties, or other legislation. The power may also be used to stifle criticism of the Executive Branch, and thereby deprive the Nation of the vigorous oversight that is so often needed.

22. In a passage recorded in Madison's Notes, Benjamin Franklin recounted on June 4, 1787 for the Constitutional Convention his experience "under the proprietary Government of Pena." with an absolute Executive veto. Franklin told the Convention:

> The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him. An increase of his salary, or some donation. was always made a condition; till at last it became the regular practice, to have orders in his favor on

the Treasury, presented along with the bills to be signed, so that he might actually receive the former before he should sign the latter.

An unrestrained veto power would be, in Franklin's words, "a mischievous sort of check," that would lead to "a complete subjection to the will of the Executive." While I have no fear that Presidents will use their newly minted veto power for any venal purpose, I also have no doubt, based on everything that I have learned and observed about Congresses and Presidents, that power will be used once it is freed from restraint. From our first Congress until the convening of this Congress, our Presidents, because the Convention had crafted a carefully balanced provision for the exercise of presidential power to sign or conditionally negative bills in their entirety, have been required to weigh the good and the bad as they see it, just as Members of Congress must do on the final passage of legislation, and make a broad determination about how the balance comports with the public interest. The Line Item Veto Act liberates Presidents from that restraint which was essential to the Framers' design and, therefore, in my judgment causes great harm to our system of separated powers.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 24, 1997.

/s/ ROBERT C. BYRD
ROBERT C. BYRD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET. AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET. AL., DEFENDANTS

DECLARATION OF MARK O. HATFIELD

DECLARATION OF MARK O. HATFIELD

Mark O. Hatfield hereby deposes and says pursuant to 28 U.S.C. 1746:

1. I am one of the plaintiffs in this action.

2. For thirty years, between January 3, 1967 and January 3, 1997, I was a United States Senator from Oregon. For twenty-five of those years, from February 1972 until my retirement, I served on the Senate Committee on Appropriations. I was chairman of the Committee for eight years (1981 through 1986, and 1995 through 1996), and was its ranking minority member for eight years (1987 through 1994). I also served in leadership positions as either chairman or ranking minority member of the Energy and Water Subcommittee of Appropriations from February, 1972 to January, 1995, and was chairman of the

Transportation Subcommittee of Appropriations from January, 1995 to January, 1997.

3. I became a plaintiff in this action even though at the time of filing the complaint only one day remained of my Senate service. I did so because of my conviction that each day of the Line item Veto Act's existence diminishes the authority and responsibility of Members of Congress, and grievously damages the constitutional system of separated powers. As I described to the Senate on March 22, 1995 (in remarks recorded at pages S4328 and S4329 of the Congressional Record for that day), this is a constitutional and not a partisan issue. I related that day, and believe today, that the Act abdicates to the President authority that reaches far beyond the question of "pet projects" that Members might insert in appropriations bills, and will allow Presidents of either party effectively to eliminate funding for whole departments or defense projects (no matter what my individual views on those might be) that the Congress in the exercise of its constitutionally conferred power of the purse has deemed necessary for the common good.

4. I am aware that the defendants in this action have moved to dismiss it on the ground that the injury to Members of Congress will be speculative, and that in their view the case is premature, until the President uses his new line item authority and the Congress fails to enact legislation that disapproves that use. Based, however, on my twenty-five year experience in negotiating compromises concerning and shepherding to passage appropriations bills, I can aver that the Line Item Veto Act will have an immedi-

ate and pervasive impact on the formulation of legislation.

5. I join my fellow plaintiffs in their assessment, based on their long experience in the daily conduct of the public's legislative business, of the reality that power is used, whether silently or brashly, by those who possess it, and that those who are the potential objects of power will likely conform their behavior to the possessors of it. In the years that I was privileged to take part in the appropriations process of the Congress, our work was guided by the awareness that the Founders gave our Chief Executive an important but limited constitutional veto power and that our product would be subject to that power. But there was always a reason for the President to be restrained in the exercise of that power, because the President needed to assess whether for any particular piece of legislation there was more that he favored than disfavored. By freeing the President from that balancing requirement, the Line Item Veto Act changes the reality of the legislative process, not at some future date, but now and on every day that Members must consider how to reconcile the competing interests that are pressed upon them.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January *22*, 1997.

/s/_____
Mark O. Hatfield

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

DECLARATION OF CARL LEVIN

Carl Levin hereby deposes and says pursuant to 28 U.S.C. Section 1746:

1. I am the senior Senator from the State of Michigan and one of the plaintiffs in this action. I have served as a Senator from Michigan continuously since January 3, 1979, and was reelected to a fourth term on November 5, 1996. My present term will expire on January 3, 2003, and will include six of the eight years in which, by its terms, the Line Item Veto Act (hereafter, "the Act") is intended to be in effect.

2. For the past nine Congresses I served on the Committee on Armed Services, the Committee on Governmental Affairs, and the Committee on Small Business. In the 105th Congress, I am serving on these same committees as well as the Select Committee on Intelligence. As the most senior Democrat

on the Armed Services Committee, I hold the position of Ranking Minority Member on that committee.

3. As a Member of the Senate for 18 years, I have worked and voted on hundreds of bills providing for appropriations direct spending and limited tax benefits as defined by the Act. I have similar duties in the 105th Congress. Among my responsibilities are direct spending programs that are within the jurisdiction of the committees on which I sit, including military and civilian retirement programs. Also, as explained at page 33 of the Conference Report on the Act, the President, in certain circumstances, is empowered to "look through" appropriations acts to the related authorization acts, in selecting items and amounts to cancel. The conference cited as an example a provision of the National Defense Authorization Act, legislation within the jurisdiction of the Armed Services Committee.

4. It has been my experience that as soon as a Congress begins, Members start developing, drafting and debating legislation. At each step of the way, even before a bill is introduced, we Members make decisions about what we can support, what we must oppose, and what compromises we can accept. These decisions are part of the legislative process and are shaped by discussions and negotiations with fellow Senators, Members of the House, Administration officials and the President and Vice President. Such negotiations and the compromises that flow from them are an integral part of our duties as Members. These negotiations and compromises, which start with the beginning of a Congress and continue throughout the life of the Congress, are central to the way we conduct our work as legislators.

5. Bills, resolutions, treaties and nominations on which the Senate votes are, and I believe will inevitably continue to be, the product of the negotiation process I have previously described. Legislation that Congress sends to the President is invariably a package of dozens, often hundreds, of decisions that are the product of individual negotiations and compromises made throughout the course of the legislative process. For the past 18 years, I have performed my legislative responsibilities with the knowledge and confidence that the legislation we Members present to the President for signature or veto must be signed or vetoed as a whole rather than in parts. This requirement provides certainty upon which I base my conduct as a legislator and the votes I cast.

6. My ability to represent the interests of the people of Michigan in the negotiations and decisions required by the legislative process is significantly impaired by the Line Item Veto Act for the following reasons:

A. Whether or not the President ever in fact cancels an item under the Act, while the Act is in effect, I will no longer have the certainty that the results of my day to day negotiations and decisions, if included in legislation passed by both houses of Congress and presented to the President, will be included in the final legislation that will be permanent law unless vetoed by the president. I can no longer affirm to my constituents that once a particular provision of importance to them is included in legislation presented to the President such pro-

vision will be permanent law unless vetoed by the President.

B. Over the past 18 years there have been many occasions when I have supported one or more provisions of a bill containing appropriations, direct spending or tax benefits but have voted against the bill on final passage, because I have opposed even more strongly other provisions in the legislation. Similarly, it is not uncommon for me to question or oppose one or more provisions of a bill containing appropriations, direct spending, or tax benefits but to vote for the bill on final passage, because I support even more strongly other provisions in the legislation.

a. I will soon, and inevitably, be in a circumstance in which I vote for a bill on final passage that is subject to the Line Item Veto Act and that contains one or more provisions which I support and which have been the result of various negotiations. When that bill is presented to the President, the President will have the power to approve it while canceling the provision or provisions which I concluded had warranted my affirmative vote for the entire bill. If the President cancels one or more of those provisions, that cancellation would change the effect of my vote under the Constitution. Rather than giving legal effect to the combination of provisions which has been negotiated through both houses of Congress, some of which I support and others I question or oppose, following the President's action my vote will give effect to provisions in a bill that I would not have supported in the absence of those that I did. So I would have, under the Act, helped enact a law I would have opposed had I been able to know its contents.

b. In addition, where a vote in the Senate on final passage of a bill is close, one provision in the bill can make the difference with respect to the bill's passage or defeat. If passage of a bill depends upon inclusion of a particular provision which the President later cancels under the Act, then we as Members of Congress will have enabled the enactment of a law that we would not have otherwise presented as legislation to the President, and the legislation that we did present will not match the legislation which remains in effect after the President's cancellation. In short, the legislation which we in Congress approved and presented will not be the law, and the law would never have become law had we voted on the bill without the canceled items.

c. A number of times during my service in the Senate I have seen bills approved by a one-vote margin. In many cases, each Member who voted for such a bill is often viewed as being the critical, deciding vote. If the President were to cancel a key provision of such a bill that was the basis for my support of the bill, then my representative role would be undermined even more severely given the visibility and significance of the vote.

7. In fulfilling my responsibilities as a Member of Congress I take many actions that are of consequence to our nation and my constituents. When all is said and done, however, it is my power to vote on legislation that is most basic. Until now, I have voted on final passage of bills with the absolute certainty that the Constitution provides: that the entirety of our product, which results from compromises within and between two Houses, would either all become law, or

that none of it would be. The cancellation power of the Line Item Veto Act now removes the certainty in the legislative process that defined the meaning of my votes on bills providing for appropriations, direct spending and limited tax benefits and governs my conduct with respect to such legislation.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 24, 1997.

/s/_____
Carl Levin

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

DECLARATION OF SENATOR DANIEL PATRICK MOYNIHAN

Daniel Patrick Moynihan hereby deposes and says pursuant to 28 U.S.C. § 1746:

1. I am the senior United States Senator from New York and a plaintiff in this action. I am beginning my 21st year of service in the Senate. I am the Ranking Member (and former Chairman) of the Committee on Finance, on which I have served during my entire tenure in the Senate. The Committee on Finance is the Senate's tax-writing committee, and also has broad jurisdiction over legislation regarding the nation's health and income security programs, trade policies and debt management. I am also a member (and former Chairman) of the Committee on Environment and Public Works, which has jurisdiction over environmental policy and regulation, water resources, fisheries and wildlife, regional economic development, highway construction and maintenance,

public buildings, and public works (such as bridges and dams).

2. Additionally, I am a member (and former Chairman) of the Joint Committee on Taxation, which is comprised of five members of the Senate Finance Committee and five members of the House Ways and Means Committee. I have served on the Joint Committee for 10 years. Under the Internal Revenue Code, the Joint Committee is responsible for overseeing the operation, effects and administration of Federal tax laws, and for reporting (with recommendations if it deems advisable) to the House Ways and Means and the Senate Finance Committees. The Joint Committee is responsible under the Line Item Veto Act for identifying tax provisions subject to cancellation by the President, as described below.

3. My fellow plaintiff, Senator Robert C. Byrd, will be describing, in his declaration, the impact of the Act on the appropriation power of the Congress. I will do the same for direct spending and taxation, which are subjects of great importance to the committees on which I serve.

Direct Spending

4. The Act authorizes the President to cancel "any item of new direct spending." To help in understanding the reach of the Act with respect to direct spending, I shall point out several of the Act's features.

5. The Act defines "direct spending" to mean "(A) budget authority provided by a law (other than an appropriation law); (B) entitlement authority; and [(C)] "the food stamp program." 2 U.S.C. § 691e(5).

The Congressional Budget and Impoundment Control Act of 1974 defines "entitlement authority" as authority (including authority for loans and grants) to make payments "to any person or government if, under the provisions of the law containing such authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by such law." 2 U.S.C. §§ 622(9) and 651(c)(2)(C). In 1996, this category encompassed approximately 70 major direct spending programs, including Medicare and Medicaid. Although direct spending mainly involves payments to individuals, the President also will have authority to cancel payments to state and local governments.

6. Under the Act, the term "item of new direct spending" means "any specific provision of law that is estimated to result in an increase in budget authority or outlays for direct spending" relative to the most recent budget baseline calculated by the Office of Management and Budget pursuant to section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985. 2 U.S.C. § 691e(8).

7. "New direct spending" might occur in the current year as a result of a change in law, but also may occur in a future year. To be subject to the President's cancellation power, legislation that provides for direct spending need not result "in a net increase" in spending, for, as described at page 36 of the Conference Report, "[a] provision of a future law that increases direct spending would be subject to the President's cancellation authority whether or not it is offset by another provision that reduces direct spending or increases revenues in the same law." Also at page 36, the conferees note that the President

may base cancellations on the "interactions among provisions in a new law, other provisions in that same new law, and underlying law." Therefore, the basis for the President's decision to cancel an item will not be limited to the particular spending measure presented to him.

8. The Act defines the power to "cancel" direct spending as the power "to prevent" it "from having legal force or effect." 2 U.S.C. § 691e(4)(B). The conferees explained, at page 22 of their report, that cancellation renders a direct spending provision "void, such that the obligation of the United States has no legal force or effect." For entitlements, the conferees explained, at page 29 of their report, cancellation would negate the government's "legal obligation to pay a benefit," and for food stamps it would "eliminat[e] the increase in food stamp obligations that would otherwise occur."

9. The Finance Committee has legislative jurisdiction in the Senate for most of the nation's large entitlement programs, including Social Security, Medicaid, Medicare, and welfare. Programs within the Finance Committee's jurisdiction account for over 80% of overall direct spending. The Environment and Public Works Committee has legislative jurisdiction over direct spending highway and transit programs.

10. An issue that arose as part of the Medicare debate in the last Congress (and which could arise again this year) illustrates the impact of the Act's direct spending provision. The issue concerned proposed reductions in Medicare payments to teaching hospitals. My interest in this issue derives from my conviction that our teaching hospitals, several of

which are located in New York, have played, and must be allowed to continue to play, a vital role in the advancement of medical science and health care in the United States. In the vetoed Balanced Budget Act of 1995, significant cuts were proposed in Medicare spending, including reductions in Medicare disproportionate share hospital payments (two-thirds of which are made to teaching hospitals) and in Medicare's direct and indirect medical education payments. As a result, a number of members of Congress were concerned that teaching hospitals would be adversely affected by the Medicare cuts. To help remedy this problem, a provision was added to the bill to establish a Teaching Hospital and Graduate Medical Education Trust Fund, and to provide greater Federal funding for graduate medical education. Both the Trust Fund and attendant increases in funding would be considered an item of new direct spending, and therefore subject to cancellation under the Line Item Veto Act.

11. When Medicare legislation next is considered in Congress, I will again support a similar item to protect teaching hospitals. Under the Line Item Veto Act, however, if that provision is passed by Congress and the President disagrees with the legislative judgment that teaching hospitals will be placed at risk by Medicare changes, he may cancel the Trust Fund provision immediately on signing the legislation containing the provision. He will be free to make his own legislative judgment about need for the Fund, and upset the balance struck by the Congress, even if that balance was necessary to achieve a majority in either or both houses. Indeed, the mere existence of this possibility will seriously encumber the process of crafting legislation capable of passing both houses.

I cite the Teaching Hospital Trust Fund only illustratively. What is certain is that similar problems inevitably will arise in the consideration of major entitlement legislation.

Limited Tax Benefits

12. Under the Act, the President may cancel in whole "any limited tax benefit." 2 U.S.C. § 691(a). The Act defines a "limited tax benefit" generally as any tax provision (including "a Federal tax deduction, credit, exclusion, or preference") that (1) loses Federal tax revenue in either the first fiscal year for which the provision is effective, or the five-year period beginning with the first fiscal year for which the provision is effective, (2) applies to 100 or fewer beneficiaries in any fiscal year, and (3) is not within a number of broad exceptions generally regarding whether similarly situated taxpayers receive the same tax treatment under the provision. 2 U.S.C. § 691e(9). The Act also defines a "limited tax benefit" to include any transition rule that will benefit 10 or fewer taxpayers in any fiscal year generally. Certain limited exceptions are provided.

13. As for new direct spending, cancellation is defined as preventing these measures "from having legal force or effect." 2 U.S.C. § 691e(4)(C). The conferees, at page 29 of their report, state that cancellation will authorize the President "to collect the tax that would otherwise not be collected or to deny the credit that otherwise would be provided."

14. With respect to any tax bill, the Joint Committee on Taxation is required to provide the conference committee with a statement listing all of the limited tax benefits, or a statement that the bill

contains none. The conference committee then may include all of the information provided by the Joint Committee as a separate section of the bill or exclude the information entirely. The identification of limited tax benefits in such a statement as part of the conference report is not subject to judicial review. If a statement from the Joint Committee is included in the conference report, the President may cancel only those limited tax benefits, if any, that are listed in the statement. If no statement from the Joint Committee is included, the President may cancel any items that he determines are limited tax benefits in the bill.

15. To illustrate the issues presented by this provision, I refer to the Stop Tax-exempt Arena Debt Issuance Act, legislation I originally introduced in 1996 to eliminate tax-exempt financing of professional sports facilities. I sponsored this legislation because I believe scarce Federal tax dollars can be better spent on education and other priorities. Even so, I recognized that a few localities had expended significant time and funds in planning professional sports facilities, in reliance upon professional advice that tax-exempt financing would be available. Thus, my bill provided transitional relief for those stadium projects that had progressed to a point at which it would have been inequitable to subject them to the changes proposed in the bill.

16. Under the Act, if fewer than 10 issuers of tax-exempt sports stadium bonds are covered by the bill's transition relief, the President may cancel the transition relief provision. In such a circumstance, the threat of a line item veto encourages either the omission of the transition relief, which could make the bill unfair and reduce its chances of enactment, or

the broadening of the transition relief more than is equitably necessary to cover more than 10 taxpayers and thereby fall outside the ambit of the Act. The latter alternative could cost significant revenue in the short run, which could also affect the viability of the entire bill.

The Immediacy of Our Injury

17. Defendants have moved to dismiss our complaint, arguing, among other things, that our claim of injury is "purely speculative." However, there is nothing speculative about how the line item veto power injures members of Congress, and the nature of this injury would not have been lost on the Framers. According to Madison's Notes of Debate in the Federal Convention, quoting Col. Mason on June 5, 1787, the Framers understood that the Executive, for example, would use an absolute power over legislation to "refuse its assent to necessary measures till new appointments shall be referred to him." That same day James Wilson observed, referring to the proposal for a qualified veto, that "[t]he Legislature would know that such a power existed, and would refrain from such laws, as it would be sure to defeat," and that the "silent operation" of the veto would achieve the Legislature's conformance to the President's wishes while allowing the actual veto to be "seldom" used.

18. The Framers would have understood, therefore, that line item veto authority would alter immediately, to the significant advantage of the President and the disadvantage of Members of Congress, the allocation of power between them.

19. The Framers would have understood a further truth based on their ample understanding of human behavior. As Madison described in Federalist No. 51, the Framers conceived "the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." How did they contrive to do this? The Framers took interest as a given and virtue as something to be acquired. "Ambition must be made to counteract ambition." From this we derive the central principle of the Constitution, the various devices which, in Madison's formulation, would offset "by opposite and rival interests, the defect of better motives."

20. For these "opposite and rival interests" to produce a workable Government, the Framers understood that "a compromise of . . . dissimilar interests and inclinations" would be necessary. In his last essay (Federalist No. 85) to the citizens of my state, in the great debate to secure their approval of the Constitution, Hamilton, speaking of the Constitution but in language equally applicable to legislation, observed: "The result of the deliberations of all collective bodies must necessarily be a compound, as well of the errors and prejudices, as of the good sense, of the individuals of whom they are composed."

21. Yet under the Line Item Veto Act, the incentive to compromise, which is indispensable to our system of competing interests, has been dealt a blow that will be felt on each day of the Act's life. As I stated on the floor of the Senate on March 27, 1996 (at pages S2973-74 of the Record for that day):

> Mr. President, these compromises make major legislation agreeable and effective. Supposing a member with whom a chairman worked were asked to make a concession in return for an accommodation; supposing that member had to think: The minute this bill becomes law, that chairman will go to that President and say, "Take out that provision that was made for the Senator from Louisiana, because it was only done to get your bill by, Mr. President." You will not have that which makes legislation possible. You will not have that spirit of trust, which performance reinforces and creates the stability of our institutions. For if there is no trust, there will be no compromise, and if there is no compromise, there will be no Government—no stable Government.

22. I join and ascribe to the description in paragraph 19 of Senator Byrd's declaration regarding the effect of the Act on the votes that I and each of my colleagues will cast in this and subsequent Congresses with respect to items subject to the Act.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 24, 1997.

/s/_____

DANIEL PATRICK MOYNIHAN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

DECLARATION OF DAVID SKAGGS

David Skaggs hereby deposes and says pursuant to 28 U.SC § 1746:

1. My name is David Skaggs and I am one of the plaintiffs in this action. I represent the Second Congressional District of Colorado and have been a member of the House of Representatives since 1986. In 1991, I was appointed to the House Appropriations Committee where I serve on the Subcommittee on Interior and the Subcommittee on Commerce, Justice, State and the Judiciary. I also serve on the House Permanent Select Committee on Intelligence.

2. I am a plaintiff in this action because of my firm conviction that the Line Item Veto Act abridges the constitutional responsibilities assigned to the legislative branch and unconstitutionally attempts to expand the power of the Executive branch. I spoke against passage of the Line Item Veto Act on the House Floor on March 28, 1996, and voted against it. Article I, Section 7 of the Constitution vests all legislative

powers in the Congress and limits the President's role in legislation to either approving and signing a bill or returning it with his objections. These careful limitations were crafted by the Framers in part to guard against the accretion of power in the American president. The unilateral "repeal-power" purportedly granted to the President under the Line Item Veto Act may be appropriate for a monarchy but it is an affront to a system of representative democracy.

3. From my experience as a legislator, I believe the expanded powers granted the President under the Line Item Veto Act, have a great potential to be used to affect votes on other, non-appropriations matters. For example, in the 1980s, when Congress was debating whether to provide aid to the Nicaraguan Contras, if a member of Congress was seeking funding for a needed courthouse in his district, he might well have received calls from the White House saying, "Congressman, I notice you had some success in dealing with this need in your district. We are pleased at that, but we need your support on aid to the Contras." The not-so-subtle message would be, you vote on what we want or the President will cancel a benefit to your District. This assumed new power of the President thus subjects Members of Congress to a new and significant form of Executive Branch pressure and erodes the separation of legislative and executive powers.

4. The impact of the Line Item Veto Act is immediate. It will affect all attempts at bargaining and compromise in putting together an appropriations bill because Members will be aware that the President has the power to single out particular spending items for elimination. Negotiations over appropriations

bills begin as soon as the President submits his proposed budget in early February. On the Interior Appropriations subcommittee, we have hearings already scheduled starting in February. Starting March 4, outside witnesses from around the country will present testimony about federal funding for particular projects and programs. The Line Item Veto Act will loom over our deliberations as we must consider the White House position on each case.

5. I am informed that the Appropriations Committee will receive requests for supplemental appropriations for the current fiscal year in the next three or four weeks. These requests will deal with national security matters, disaster relief and forest fire fighting, and will require immediate attention by the Committee. Thus, it is very likely that negotiations, decisions and votes that are all subject to unique influence and pressure emanating from the Line Item Veto Act will have occurred even before this case is set for oral argument on March 21, 1997, and will certainly continue thereafter.

6. Because the President has the purported power under the Line Item Veto Act to pick and choose which projects to cancel up to five days after enactment of a law, he has been given the power to undo legislative compromises. As such, the Line Item Veto Act has made the President into a super-legislator permitting him to refashion legislation and consequently reduced the powers vested in each legislator under the Constitution to a commensurate extent. This new power has an immediate impact on negotiations over appropriations bills and on the votes that will occur on those bills.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 25, 1997.

/s/ DAVID SKAGGS
DAVID SKAGGS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

DECLARATION OF HENRY A. WAXMAN

Henry A. Waxman hereby deposes and says pursuant to 28 U.S.C. 1746:

1. My name is Henry A. Waxman, and I am one of the plaintiffs in this action. I represent the Twenty-Ninth Congressional District of California. I have been a member of the House of Representatives since 1975. I was Chairman of the House Energy and Commerce Committee's Subcommittee on Health and the Environment from 1979 through 1994 and its ranking Democrat in 1995 and 1996. In January 1997, I was elected to be the ranking Democrat on the House Government Reform and Oversight Committee.

2. My principal work in Congress has been devoted to health and environmental policy. I have participated in negotiations on scores of legislative measures with other House members and as a member of House/Senate conference committees.

3. An express purpose of the Line Item Veto Act is to provide the President with a tool to cancel spending measures. The law, however, gives the President authority to disregard the constitutional requirement that all legislative powers rest with Congress. It allows him to disrupt negotiated compromises achieved by Congress and to unilaterally cancel parts of legislative agreements immediately after he signs them into law. It allows him to make unilaterally a new, revised law that might never have received the support of the majority in either House of Congress.

4. The Line Item Veto Act's shift of power from Congress to the President is obvious in the review of the legislative history of virtually any piece of spending legislation Congress has passed. An illustrative measure, with which I had close experience, that comes vividly to mind is the Omnibus Budget Reconciliation Act of 1987. Negotiations on that legislation were particularly difficult to resolve and clearly demonstrate the problems the law poses and the dramatic transfer of power it gives the President.

5. In 1987, the House and Senate passed substantially different versions of that year's Omnibus Budget Reconciliation Bill. I was the principal sponsor of provisions in the House bill to expand Medicaid coverage for pregnant women and children and strengthen nursing home standards to address deficiencies reported in 1986 by the Institute of Medicine of the National Academy of Sciences. The Senate passed less sweeping Medicaid provisions than the House, and President Reagan strongly opposed provisions in both measures. Acting within his constitutional powers, the President advised that he

would veto any measure that contained provisions that were objectionable to the Administration.

6. After marathon negotiations, we finally reached a conference agreement on December 21, 1987, more than two months after fiscal year 1987 had ended. The President's veto threat required House negotiators to remove or dramatically scale back the Medicaid provisions that I had advocated. While I disagreed with the President's policies, I fully respected his right to use the veto power in the manner anticipated by the Framers. The agreement we reached was the result of hard compromises.

7. Had the Line Item Veto Act been in effect, these congressional negotiations and our ultimate consensus on Medicaid provisions would have been irrelevant. The President could simply have canceled them as new spending items. No matter what compromises the House and Senate made, and no matter what provisions were included in legislation that passed both Houses, the President could have item-vetoed the provisions I supported, while leaving provisions that I opposed but had acceded to in order to secure passage of the bill.

8. Thus, congressional consideration of new items of spending in the future could be essentially meaningless to the final outcome. A President will be able to remove the spending items he opposes, even though they are part of a larger compromise that helped make the final product possible. Further, he will be able to cancel them even when they are offset by other provisions in the legislation.

9. Our system of representative Democracy is predicated on the vesting of all legislative powers

in Congress. The Framers gave the President the important power of requiring the Congress to reconsider legislation, but they did not give to the President the power to rewrite laws on his own. In violating this allocation of powers, the Line Item Veto Act seriously disrupts the legislative process and diminishes the role of Congress.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 23, 1997.

/s/ HENRY A. WAXMAN
HENRY A. WAXMAN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

PLAINTIFFS' MOTION FOR LEAVE TO FILE LEGISLATIVE SUMMARY

Plaintiffs hereby move this honorable Court for leave to file the attached Legislative Summary ("Summary"). The Summary recounts the legislative history of the Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200 (the "Act"). The Summary is intended to assist the Court in reviewing the legislative history materials related to the Act, which will be separately deposited with the Court for its convenience. In conformance with this Court's Rule 108(m), plaintiffs have consulted with counsel for defendants and have been advised that defendants reserve their right to respond to this Motion.

Respectfully submitted,

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Counsel for Plaintiffs

Date: January 27, 1997

LEGISLATIVE SUMMARY

HISTORY OF THE LINE ITEM VETO ACT OF 1996

1. The House of Representatives

On January 3, 1995, H.R. 2 was introduced and referred to the Committee on Government Reform and Oversight. *See* H.R. 2, 104th Cong. 1st Sess. (1995). The bill was a broad-ranging "enhanced rescission" line item veto, under which the President had 20 days after a bill is enacted to veto items which he disapproved. It entitled the President to "rescind all or part of any discretionary budget authority." § 2(a). His authority was not limited to items in the statute itself, but included identifiable items in the legislative history. The bill provided that any budgetary authority that is rescinded "shall be deemed canceled unless" the Congress overrides it, § 3(a)(1), and that "any provision of law *vetoed* under this Act . . . shall be deemed *repealed* unless . . . a rescission/receipts disapproval bill restoring that provision is enacted into law." § 3(a)(2) (emphasis added). In addition, it also authorized the President to "*veto* any targeted tax benefit" (one limited to a few persons), subject to the same two-thirds override. § 2 (emphasis added).

On January 12, 1995, the House Government Reform and Oversight Committee held a joint hearing with the Senate Government Affairs Committee, at which the only dissenting witness was Chief Judge Gilbert S. Merritt of the Sixth Circuit, who, as Chairman of the Executive Committee of the Judicial Conference, expressed concern about the policy implications of a presidential line item veto for appropriations for the judiciary. *See* H.R. Rep. No. 11, 104th Cong., 1st Sess. 13 (January 30, 1995) ("House Report"). A markup was held on January 25, 1995, and the bill was

reported favorably, with amendments, by a roll call vote of 30-11. *Id.* at 12.

There were several committee decisions of note. The period during which the President had the right to veto items was shortened from the original 20 calendar days (not including Saturdays, Sundays, or holidays), to 10 calendar days, not including Sundays. *Id.* at 2. The term "targeted tax benefit" was expanded somewhat so that the maximum size of the group of taxpayers whose benefits could be vetoed went from five in the bill as introduced to 100. *Id.* at 2, 26, 27. An attempt to exclude the judiciary was defeated by a vote of 17-29, *id.* at 21, and efforts to sunset the legislation were turned back by a vote of 17-22. *Id.* at 31, 35.

The House Report was clear about the purpose of H.R. 2: "to change the tilt of the game from one that favors spending to one that favors saving." *Id.* at 7. In discussing the problem which the President had in obtaining congressional approval of rescissions, the Report stated that the bill "reverses the burden. Presidential proposals will now become law unless Congress takes action to stop them." *Id.* at 9.

Several other references clarify how the bill was intended to work. Thus, the committee observed that its bill "strengthens the President's ability to rescind (cancel) appropriated funds. It also allows the President to *eliminate* targeted tax benefits . . . ." *Id.* at 8 (emphasis added). Although the report refers to the actions of the President as "recommendations" that various items "be terminated," the report confirms that no prior action by Congress is required since the "recommendations will automatically become law after a fixed period of time, unless Congress, during a designated review period, votes by bill

or joint resolution to disapprove." *Id*; *see also id.* at 10 (budget authority or targeted tax benefits will automatically be terminated after a fixed number of days unless Congress acts by a bill or joint resolution to disapprove the President's proposal); *id.* at 14 ("Any provision of law, as set forth in a President's special message, shall be deemed *repealed* unless a rescission/receipts disapproval bill restoring that provision is enacted into law.") (emphasis added).

Although line item veto supporters often referred to the experience of the states with the item veto, the House Report recognized that "H.R. 2 differs fundamentally from the kind of item veto authority granted to governors in 43 states." *Id.* at 11. Whereas state appropriations bills are highly itemized, federal laws are not, and the Committee sees "no reason to do so" because that would "add an undesirable rigidity to agency operations." *Id.* Instead, Congress could continue to appropriate with lump sums, and the President could "propose for reduction or elimination any dollar amount specifically identified in a bill or committee report or joint explanatory statement accompanying a conference report on that Act," so that the President would have "greater power and discretion than he would have with item veto authority." *Id.* at 12.

House floor consideration of the bill occurred on February 2, 3, and 6, 1995, 141 Cong. Rec. H.1078-1142; 1168-1191; 1225-1264 (daily ed.), and was generally less noteworthy for what was said than for the amendments that were offered and rejected.[1] Initially, two

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[1] Unless otherwise indicated, all references to floor debate are to 141 Congressional Record, daily edition, with a prefix of S. or H.

amendments were adopted unanimously. The first, offered by Representative Clinger, the Chairman of the Committee on Government Reform and Oversight, was intended to clarify that, although the bill permits the President to look to legislative history and thereby go behind appropriations bills, he "may not look to Office of Management and Budget (OMB) or agency justifications or other types of documents to rescind funds for programs not specified by Congress." H.1106. It was also intended to assure that the President "may only rescind dollar amounts, not bill language . . . [contrary to the practice] in some states [where] the Governor does have the power to actually effect [*sic*] statutory language." H.1106. Another amendment, sponsored by Representative Pelosi, was along similar lines and specified that the President may not "change any prohibition or limitation of discretionary budget authority set forth in any appropriations act." H.1107.

Most of the amendments offered were rejected. Representative Moran offered an amendment, comparable to the one that had been previously rejected in committee, to remove the authority to rescind budgetary authority for the judicial branch. H.1107. That amendment was rejected by a vote of 119-309. H.1115. Three separate efforts were defeated to broaden the authority of the President to cut back on tax benefits of various kinds. H.1116, H.1125, H.1168, H.1170, H.1235, H.1255. Two other attempts to alter the scope of the rescission authority were also turned back. Representative Skelton moved to limit the President's cancellation authority to $50 million of discretionary budget authority and to exclude "any program, project, or activity within the major functional category for national defense." H.1130. That amend-

ment was defeated by a vote of 52-362. H.1138. Representative Orton attempted to bring contract authority within the scope of the line item veto, H.1225-34, but that was defeated by a recorded vote of 65-360. H.1254. An effort was made to impose a sunset date of January 1, 2000, H.1139, but that, too, was strongly opposed by supporters and rejected by a vote of 153-258. H.1142.

The single most crucial vote was on an "expedited rescission" substitute offered by Representatives Wise, Stenholm, and Sprat. Expedited rescission would have established procedures for voting on a President's proposed rescission under the Impoundment Control Act of 1974, 2 U.S.C. § 688. As Representative Stenholm put it: "[t]he only question is, how much power do you wish to cede to a President. That is it." H.1176. Even though 342 Members of the House had voted for this approach in 1994, H.1171-72, H.1245, and even though there was no question as to the constitutionality of expedited rescission, H.1185, the House twice voted it down by margins of 167-246, H.1186, and 156-266. H.1242-56.

The final amendment, which was adopted without objection, created a mechanism for expedited judicial review. H.1138-39. It gave standing to Members of Congress, a hearing before a three-judge district court in the District of Columbia, direct appeal to the Supreme Court, and expedition in both Courts. The judicial review amendment was offered by Rep. Deal of Georgia, a strong supporter of the bill, who noted that "[s]ince we are proceeding in a statutory form for a line item veto and not a constitutional amendment, it should be obvious that until that constitutionality is clarified, it will be under a cloud." H.1138. In his prepared statement, he observed that "[h]ope-

fully, the procedure established by my amendment will result in a final resolution regarding the constitutionality of line item veto authority before the fiscal year 1996 appropriation bills are sent to the President." H.1139. His statement further noted that "[i]f my amendment for judicial review is not added to the bill, it is unlikely that the courts would consider the issue until the President exercises the line item authority." H.1139. His position was supported by Rep. Blute, another proponent, who observed that "this is a good amendment which simply ensures that any court challenge to H.R. 2 be considered on an expedited basis." *Id.* Congresswoman Collins, an opponent of the bill, also supported this amendment because it allows "a test case on this legislation constitutionally without having to wait for the President to use the line item veto authority this bill gives him." H.1139.

At the end of the lengthy debate, a vote to recommit was defeated, largely along party lines, by a vote of 185-241, H.1263, followed by an affirmative vote on final passage of 294-134. H.1264.

2. The Senate

In the Senate, there were two principal bills. S. 4, an "enhanced rescission" bill, was substantially the same as H.R. 2, except that it did not permit item veto of tax expenditures. S. 4 required a two-thirds override, allowed the President to reduce as well as eliminate items of budgetary authority, and was not limited to items appearing in an appropriations bill itself. *See* S. Rep. No. 9, 104th Cong., 1st Sess. (1995); S. Rep. No. 13, 104th Cong., 1st Sess. (1995).

The other vehicle, S. 14, was an "expedited rescission" bill, similar to the Stenholm, Wise, and Sprat

substitute rejected on the House floor, except that it also applied to new entitlements and to tax expenditures. *See* S. Rep. No. 10, 104th Cong., 1st Sess. (1995); S. Rep. No. 14, 104th Cong., 1st Sess. (1995). Both bills were referred jointly to the Committees on Budget and Governmental Affairs. On January 18, 1995, the Budget Committee, Chaired by Sen. Domenici, held hearings on both bills. In his opening statement, the Chairman stated that he preferred S. 14, and described S. 4 as involving a "maximum shift in power." *Line-Item Rescission Authority: Hearings on S. 4 and S. 14 Before The Comm. on the Budget, 104th Cong., 1st Sess.* 2 (1995).[2] In the words of its sponsors, S. 14 would have "guarantee[d] the President a vote on his rescission proposals while maintaining the delicate balance of power between the two branches on spending authority." S. Rep. No. 9 at 15 (additional views of Sen. Domenici).

Shortly thereafter, the Subcommittee on the Constitution, Federalism, and Property Rights of the Committee on the Judiciary held a hearing to consider two proposed constitutional amendments that would create a line item veto, S.J. Res. 2 and S.J. Res. 16. *See The Line-Item Veto: A Constitutional Approach: Hearings before the Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 104th Cong., 1st Sess.

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[2] Those hearings were a follow-up to a hearing held on October 5, 1994, in the 103rd Congress. The record of that hearing assembles much of the prior legislative material relating to efforts to create a line item veto, either by statute or constitutional amendment. *See Legislative Line-Item Veto Proposals: Hearing Before the Comm. on the Budget*, 103rd Cong., 2d Sess.(1994).

(1995).[3] At that hearing, Senator Biden, who described himself as a supporter of a statutory line item veto, opposed a constitutional amendment because of its permanence, *id.* at 5, 6, 10, expressed his support for the concept of "separate enrollment," *id.* at 10, but strongly urged his colleagues to insist on a sunset provision. *Id.* at 10-11.

Appearing for the Administration was Assistant Attorney General Walter Dellinger of the Office of Legal Counsel at the Department of Justice, who stated that the President supported a "strong line-item veto" bill, in particular S. 4. *Id.* at 33. He expressed his opinion that S. 4 is "clearly constitutional" as "a very strong delegation of authority to the President . . . not to expend appropriated funds . . . ." *Id.* at 34. He recognized that the President's cancellation order "is final and what happens in Congress is that Congress then must vote a new bill to actually proceed with that funding, which the President can then veto. That is why S. 4 is a two-thirds bill." *Id.* When asked about the advisability of a constitutional amendment, he expressed reservations because of its permanence. *Id.* at 35.

He also stated quite clearly what he thought would *not* be constitutional. Citing what he called "a long tradition at the Office of Legal Counsel," and invoking the views of three of his predecessors in the Reagan and Bush Administrations, he stated that all

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[3] That Committee had previously held similar hearings on April 11, 1989, and June 15, 1994, and had collected a number of scholarly and other materials. *See, e.g., Line-Item Veto: The President's Constitutional Authority: Hearings Before The Subcomm. on the Constitution of the Comm. on the Judiciary*, 103rd Cong., 2d Sess. (1994).

of them "have agreed the President does not at present have that power constitutionally." *Id.* at 36. He also said that they all agreed that "Congress cannot literally give the President a line item veto power by statute, and that attempts that appear to literally give the President a line item veto by statute are also constitutionally invalid." *Id.* at 36; *see also id.* at 38.

On the issue of separate enrollment, he noted that "[a]s much as I regret saying so," it "also raises significant constitutional issues" under the Presentment Clause, or "at a minimum, it raises such complicated questions under the Presentment Clause that it is a foolhardy way to proceed because if we and all our predecessors are right, I think that which has to be presented to the House is the thing that passed the House and the Senate and that which passed the House and Senate is the bill they voted on final passage, not some little piece of it or a series of little pieces of it." *Id.* at 38.

In his prepared statement, Mr. Dellinger explored at greater length the constitutionality of S. 4. While defending "enhanced rescission" on the ground that it was a lawful delegation to the President of discretion over spending appropriated funds, he expressed doubts about the constitutionality of the provision dealing with targeted tax benefits because it purports "to authorize the President to 'veto' targeted tax benefits after they become law, thus resulting in their 'repeal.'" *Id.* at 49. He then observed that "use of the terms 'veto' and 'repeal' is constitutionally problematic [because Article I, § 7 of the Constitution] provides that the President only can exercise his 'veto' power before a provision becomes law." *Id.* He also observed that "the word 'repeal' suggests that the President is being given authorization to change

existing law on his own [which] arguably would violate the plain textual provisions of Article I, Section 7 of the Constitution, governing the manner in which federal laws are to be made and altered." *Id.*

Mr. Dellinger's method of avoiding these "constitutional shoals" would be to "recast" S. 4 so that it "eliminates the word 'veto' from the targeted tax benefit provision, and confers on the President the power to *suspend* (rather than 'repeal') such benefits." *Id.* These changes would "preserve the purpose of the provision" and "would place the targeted tax benefit provision on the same defensible constitutional footing as the provision regarding rescission of budget authority." *Id.*

On February 22, 1995, the Senate Budget Committee reported out S. 4 with amendments, but without recommendation. *See* S. Rep. No. 9, at 13. The Committee report makes clear that the President's rescissions "would remain in effect unless Congress passed a disapproval bill . . . . and overcame the President's veto of that disapproval bill," *id.* at 1 and that the Committee considered the authority under S. 4 to be either "rescissions or repeals." *Id.* at 5.

The Committee adopted two amendments. *Id.* at 8. The first, offered by Senator Domenici, added a sunset date of September 30, 2002 (§ 1114), and the other (§ 1113), offered by Senators Conrad and Snow, established a "lock box" to assure that any savings from Presidential rescissions would be devoted to deficit reduction and not spent for other purposes. Although he voted to report out the bill, Sen. Domenici expressed "serious reservations about S. 4" in his separate views because he believed that it would "delegate too much authority to the President over the control of the budget." *Id.* at 14. He also expressed his

concern that "[o]nly a Constitutional amendment can give the President the authority to delete items in spending bills and the Judiciary Committee has jurisdiction over the line item veto constitutional amenment." *Id.* at 16. Shortly thereafter, the Senate Governmental Affairs Committee also reported S. 4 as passed by the Budget Committee, without recommendation and with no further amendments. S. Rep. No. 13, at 6.

S. 14 was also reported out by both Senate Committees, also without recommendation. S. Rep. No. 10, at 9; S. Rep. No. 14, at 6. The Committee on the Budget made some small changes to the bill as introduced, but under both versions, the President's proposed rescissions would not take effect until Congress had affirmatively approved them. S. Rep. No. 14, at 7-11; S. Rep. No. 10, at 9. In addition, S. 14 would also apply to "targeted tax benefits" which, like in the House's version, were those limited to 100 or fewer persons. S. Rep. No. 10, at 14; S. Rep. No. 14, at 11.

S. 4 then went to the Senate floor where it was considered on March 16 (S.4074-89); March 17 (S.4125-45); March 20 (S.4153-96); March 21 (S.4212-60); March 22 (S.4295-58) and March 23 (S.4409-87). Almost immediately, it was announced that the "enhanced rescission" version of the line-item veto contained in S. 4, which had been reported out by both the Budget and Governmental Affairs Committees, and which was similar to the House-passed H.R. 2, would not in fact be the approach that the Senate leadership supported. S.4075. Instead, debate would be on a "separate enrollment" proposal, on which bills had been introduced. S.4075-76.

The separate enrollment substitute was introduced by Majority Leader Senator Dole. S.4188-89. Under

separate enrollment, once an appropriations bill passed both Houses in agreed upon form, the enrollment clerks would divide the unified bill into as many separate bills as there were separate items of spending, and those separate bills would each be presented to the President for his signature. In addition to the change in the basic form of the line item veto, the most significant changes from S. 4, as reported, were the additions of new targeted tax benefits and new direct spending, as subjects on which the President could exercise his line item veto, and the addition of a sunset date of September 30, 2000. S.4189.

Because the Line Item Veto Act ultimately enacted was similar to the enhanced rescission version passed by the House in H.R. 2, and not the separate enrollment substitute, much of the Senate discussion is no longer relevant. Nonetheless, despite these differences, many of the same issues were raised on the floors of both Houses, generally with the same result. Indeed, the principal Senate sponsor of the line item veto, Sen. McCain, recognized the essential similarity between enhanced rescission and separate enrollment. S.4076.

The most significant decision in both Houses was whether to adopt a "strong line item veto" (in the Senate, separate enrollment, in the House, enhanced rescission) or to adopt expedited rescission, essentially the same debate as had occurred in committee between S. 4 and S. 14, and had occurred on the House floor. As Sen. McCain said at the outset of the Senate floor debate, "it will boil down to one single issue, have no doubt about it, and that is whether we would have a two-thirds vote on the part of both Bodies in order to override the President's veto—that is what 43 Governors have and that is what the constitutional

meaning of veto is—or whether we will have a majority vote of one House. . . ." S.4158. Or, as he put it earlier, the question "will be, is the Congress of the United States prepared to transfer significant power from the legislative branch of Government to the executive branch of Government for the sake of the future of our children?" S.4079.

Sen. Coats, a co-sponsor with Sen. McCain of a "strong" line item veto, described the Dole substitute as one with bipartisan support "that is a real veto requiring two-thirds of the Congress to override . . .." S.4192. He subsequently referred to the two-thirds requirement as "the core concept of line item veto," S.4220, including separate enrollment as a device that "also can be described as line item veto . . .." S.4221. Similarly, another supporter of the line item veto, Sen. Craig, described the two-thirds override as "really at the heart of all of this." S.4222. Thus, near the end of the debate, he observed that the "only material difference remaining between the Dole and Daschle [S. 14] versions is whether you want a line item veto to be overridden by a majority vote or a [two-thirds] vote." S.4479. A substitute "expedited rescission" alternative, which was very similar to S. 14, was introduced by Senators Daschle, Exon, and Glenn, and a motion to table it passed by a vote of 62-38. S.4428.

Two amendments were adopted on the Senate floor that are of some significance. The first, the so-called Exon "lock box" amendment, S.4259, was agreed to by consent. S.4326. The "lock box" device ensures that any savings from a Presidential cancellation are used solely to reduce the deficit. Thus, once the congressional review process has concluded, the administrative and legislative entities that keep track of the

budget make the changes permanent, thereby preventing Congress and the President from spending the money on something else, or from spending the canceled funds for their appropriated purposes if circumstances change.

The second adopted amendment was Sen. Simon's expedited judicial review provision. S.4244. Like its House counterpart, it provided for Member standing, a special three-judge court, direct appeal to the Supreme Court, and expedited consideration in both Courts. Sen. McCain stated that he was "in agreement, except with one caveat," that a severability clause be added. S.4244. Sen. Simon said that he believed this could be worked out, and Sen. McCain stated that he wanted to ensure that if "one minor provision of the Act is declared unconstitutional, I would not want the entire Act to be declared unconstitutional." S.4245. Shortly thereafter, the Senate agreed to the Simon amendment which included a separate severability provision. S.4259.

Part of the willingness of all Members of the Senate to accept the expedited judicial review provision was the recognition that, even without the exercise of an item veto, legislative practices would change immediately as a result of the President's new power to wield the item veto. Sen. McCain himself, at the opening of the debate, observed that "it will be very hard to measure the exact effect of a line item veto, because when a line item veto is threatened, we will find a dramatic reduction in the kinds of anecdotal appropriations which have plagued this body's reputation with the American people." S.4076. Sen. Coats observed that "it will change the spending habits of Congress . . . [w]e will never know the amount of money we save for items that will not be

put in these new bills for fear of exposure. Because the President has the line-item veto, it will change the way we put the bills together in the first place." S.4140. Or, as another strong line item veto supporter, Sen. Smith, observed, "if we pass the line item veto, there is going to be a lot less of the stuff put in the bill in the first place. That is for sure." S.4142. Sen. Coats made a similar point later on:

> So we will never be able to total up the amount of money that we have saved for our constituents and for the taxpayer because the line item veto will have accomplished its purpose—its purpose being to prevent this kind of activity from taking place in the first place; to prevent the kind of embarrassment that we go through on an annual basis when we discover the items that have been slipped into the appropriations bills, slipped into legislation, slipped into tax bills at the last minute in conference behind closed doors late at night, and then presented in a massive bill.

S.4221. Or, as he also noted, the line item veto power "will fundamentally change the way we think and behave. That fundamental change will mean that items which would have been attached to appropriations bills or would have been incorporated in the tax bills will not be, because of the fear that they will be exposed to public scrutiny before it finally becomes law." *Id.* *See also* S.4240 ("My guess is that many will not see the light of day because those items are items that we know cannot generate a majority of support, otherwise they would be brought as individual items to this floor . . . [o]nly we know in our hearts and in our minds what items we might have attached if we had not had line-item veto.").

Another important theme throughout the Senate floor debate was that the inclusion of the authority to item veto limited tax benefits and new items of direct spending (entitlement) was an essential element of the ultimate compromise. S.4125-26 (Stevens); S.4126 (McCain); S.4127 (Coats); S.4174 (Lott, tax deals); S.4220 (tough negotiations to bring in the tax and entitlement aspects); S.4234 (Coats, describing direct spending and tax benefits); S.4296 (Santorum, explaining bill had bipartisan support and reached tax benefits and entitlement); and S.4420 (Kyl, emphasizing the importance to Democrats of the tax benefits, lock box, and sunset provisions).[4]

With more than sixty Senators voting to reject Senator Daschle's "expedited rescission" substitute, passage of a separate enrollment bill was assured. When the final vote was taken on S.4 on March 23, 1995, 69 Senators voted in favor and 29 opposed. S.4484-85.

3. The Conference

S. 4 was returned to the House where it was considered on the floor on May 17, 1995. H.5090-97. Rep. Clinger moved to strike the substance of the Senate bill and replace it with the House bill so that the matter could then proceed to conference. H.5090. Speaking in support of his motion, Chairman Clinger referred to the Senate version as a "weaker bill" and stated that he expected a "difficult conference" be-

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[4] Sen. Hatch the Chairman of the Judiciary Committee, also offered an amendment, narrower than the one offered in the House, to exempt certain functions of the Judiciary, not including building of courthouses, from the Act. S.4341. After debate, a motion to table the Hatch Amendment was approved 85-15. S.4435-43.

cause the House bill "has a potential constitutional challenge" whereas the Senate bill "would require the enrollment of thousands of bills to pass appropriations in discrete line items requiring thousands of signatures and guaranteeing future Presidents an amazing case of writer's cramps as they deal with this as well as creating some significant amount of paperwork." H.5091. His motion was agreed to without a recorded vote. H.5094.

On March 21, 1996, nearly a year after both Houses had passed a line item veto bill, the Conference reached agreement. *See* Line Item Veto Act, H.R. Conf. Rep. 104-491, 104th Cong., 2d Sess. (1996) (hereafter "Conf. Rep."). Other than using the bill number S. 4 as the vehicle, the conference version bore no relation to the Senate-passed bill, but was quite similar to H.R. 2 as passed by the House.

First, the chosen version of the line item veto was not separate enrollment but enhanced rescission. The law's full title is "An Act to give the President line item veto authority with respect to appropriations, new direct spending, and limited tax benefits." Conf. Rep. at 14. The President's item veto power is triggered when a bill or resolution "has been signed into law pursuant to Article I, Section 7 of the Constitution." Section 2(a) (adding ICA § 1021(a)).[5] The Conferees also reduced to five days the time in which the President could exercise his veto authority after signing. *Id.*

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[5] Citations are to the sections of the Act as set forth in the Conference Report. References are also given to the new sections added to part C of Title X of the Congressional Budget and Impoundment Control Act of 1974.

The Conferees explained that they "specifically include[d] the requirement that a bill or joint resolution must have been signed into law in order to clarify that the cancellation authority only becomes effective after the President has exercised the constitutional authority to enact legislation in its entirety. This requirement ensures that the President affirmatively demonstrates support for the underlying legislation from which the specific cancellations are then permitted." Conf. Rep. at 20. The Conferees intended that the cancellations would occur "as soon as possible" and provided a "maximum time" of five days only "to ensure that all supporting material required for inclusion in the special message can be provided by the Administration." *Id.* at 22.

The President is given authority to "cancel" in whole any dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit. Section 2(a) (adding ICA § 1021(a)(1) - (3)). The terms "cancel" or "cancellation" are defined in section 1026(4). With respect to discretionary budget authority, "cancel" is defined to mean "rescind." *Id.* (adding ICA § 1026 (4) (A)). With regard to items of new direct spending, such as new entitlement or increases in existing entitlement, the term "cancellation" means "to prevent [the item] from having legal force or effect." *Id.* (adding ICA § 1026(4)(B)).[6]

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[6] "Direct spending" is defined to mean "(A) budget authority provided by a law (other than an appropriation law, (b) entitlement authority; and (c) the food stamp program." Section 2(a) (adding ICA § 1026(5)). An "item of new direct spending" means "any specific provision of law that is estimated to result in an increase in budget authority or outlays for direct spending relative to the most recent levels calculated pursuant to section 257 of the Balanced Budget and Emergency

Similarly, with respect to limited tax benefits, cancellation prevents "the specific provision of law that provides such benefit from having legal force or effect." *Id.* (adding ICA § 1026(4)(C)). The Conference Report states, "[t]he term 'cancel' was specifically chosen, and is carefully defined in section 1026. The conferees intend that the President may use the cancellation authority *to surgically terminate federal budget obligations.*" Conf. Rep. at 20 (emphasis added). In contrast to the House bill, which allowed the President to reduce as well as to eliminate items, the final version limits the power of the President to cancel items "in whole." *Id.* (adding ICA §§ 1021(a), 1026(7)). To further clarify that a cancellation of budget authority terminates the spending authority, the Act adopts a "lock box" procedure so that the "savings" cannot be used for a subsequent appropriation or direct spending measure or tax benefits. *See* Section 2(a) (adding ICA § 1024).

Like the versions that passed both Houses, the President's authority is not limited to items specified in the legislation itself. The veto power reaches not only the "entire dollar of budget authority" that is "specified in an appropriation law" but also amounts "required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included." *Id.* (adding ICA § 1026 (7) (A) (i)).

Deficit Control Act of 1985." *Id.* (adding ICA § 1026(8)). To be subject to the President's cancellation power, legislation providing for direct spending need not result "in a net increase" in spending, as "[a] provision of a future law that increases direct spending would be subject to the President's cancellation authority whether or not it is offset by another provision that reduces direct spending or increases revenues in the same law." Conf. Rep. at 36.

The cancellation authority also extends to amounts "represented separately in any table, chart or explanatory text included in the statement of managers or the governing committee report accompanying such law." *Id.* (adding ICA § 1026(7) (A) (ii)).[7] An example in the Conference Report—referring to use of a table accompanying a Conference Report—illustrates the kind of legislative materials the President may use in exercising the item veto. Conf. Rep. at 22-23. The President, however, "cannot use this authority to modify or alter any aspect of the underlying law, including any restriction, limitation or condition on the expenditure of budget authority, or any other requirement of law." *Id.* at 20.

Line item veto of "limited tax benefits" remains basically as it was enacted in both Houses. "Limited tax benefits" are "any revenue-losing provision" that provides a "deduction, credit, exclusion, or preference" to 100 or fewer taxpayers during any fiscal year that the rule is in effect, unless it is a transition provision, in which case the number of taxpayers is 10 or fewer. Section 2(a) (adding ICA § 1026(9)). One significant addition in the Conference was a process for identification of limited tax benefits. Under a new provision, if either the bill itself identifies a provision as a limited tax benefit, or the Joint Committee on Taxation does so, those are the exclusive provisions that the President may cancel. *Id.* (adding ICA § 1027)). If neither of these sources identifies any such benefits, however, then the President may use

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[7] *See also* Section 2(a) (adding ICA § 1026(7) (A) (iv)) (enabling cancellation of procurement costs based on the estimated costs multiplied by the quantities of items specified in appropriations laws or in accompanying committee reports).

the definitions under section 2(a) of the Act (adding ICA § 1026) to select benefits to be canceled. Finally, the Act precludes judicial review of Congressional identifications of a limited tax benefit. *Id.* (adding ICA § 1027 (d)).

Under the Conference bill, the procedures to be followed for the President to exercise a line item veto are basically the same as in the earlier enhanced rescission versions. As a prerequisite to issuing a cancellation order, the President must determine only that the cancellation will "(i) reduce the federal budget deficit, (ii) not impair any essential Government functions, and, (iii) not harm the national interest." *Id.* (adding ICA § 1021(a) (3) (A)). The President must send a single cancellation message for all items he wishes to cancel in each law. *Id.* (adding ICA § 1022(a)). He has five calendar days, excluding Sundays, to submit his message after enactment. *Id.* (adding ICA § 1021(a) (3) (B)).

The cancellation order is effective immediately upon receipt in the Congress. *Id.* (adding ICA § 1023(a)). As the Conference Report stated:

> Upon receipt of the President's special message in both the House of Representatives and the Senate each [item] identified in the special message is immediately canceled. The cancellation of a dollar amount of discretionary budget authority automatically rescinds the funds. With respect to an item of new direct spending or a limited tax benefit, the cancellation renders the provision void, such that the obligation of the United States has no legal force or effect.

Conf. Rep. at 22. The Report also noted that the cancellation "is nullified only if a disapproval bill is

enacted into law [in which case the] effective date for any cancellation . . . is the original date provided in the law to which the cancellation applied." *Id.* Finally, even if Congress has insufficient time to act before adjourning sine die, the cancellation continues in effect, and the disapproval period is started again in the next Congress. Section 2 (a) (adding ICA § 1025 (b) (3)).

The Act provides for expedited congressional consideration of a disapproval bill. *Id.* (adding ICA § 1025). No Congressional approval is needed to make the President's cancellation effective. Conf. Rep. at 22. In essence, Congress has 30 calendar days of session after receipt, although in the Senate, if the process is underway when the 30 days expire, the expedition rules continue to apply. In the House all items in the President's cancellation message must be included in a disapproval resolution, a limit that does not apply in the Senate. Section 2(a) (adding ICA § 1025 (c)(2)). The relevant House committee is given seven days to report the bill without amendment, and the only floor amendments that are in order are those to strike a cancellation item, which require the sponsorship of at least 50 Members. *Id.* (adding § 1025 (d)). In the Senate, additions or deletions of particular items are in order, and there is no minimum number of Senators required. *Id.* (adding § 1025(B) (4)). After the expiration of the 30 days for expedited consideration, unless there is a disapproval bill enacted within 10 calendar days, the cancellation is permanent. *Id.* (adding ICA §§ 1024(b)-(c)).

The Conferees also included a judicial review provision, *see* section 3, 110 Stat. 1211 (codified at 2 U.S.C. § 692), although they deleted the requirement for a three-judge court that was in both the Senate

and House bills. There is no explanation in the Conference Report for this change, but it appears to have been prompted by a letter from then Director of the Office of Management and Budget, Alice Rivlin, stating the Administration's opposition to three-judge courts (copy attached). Two other changes of note occurred in this provision: it was expanded to cover "any individual adversely affected by [this Act]," and the severability provision added in the Senate was deleted. Section 3.

The Conferees agreed that the bill would be made effective on the earlier of the enactment of "a seven-year plan for deficit reduction [and to] achieve a balanced Federal budget," or January 1, 1997. Section 5. And while the sunset provision that the Senate had insisted upon was included, the sunset date was extended until January 1, 2005, giving the Act a life of eight rather than five years. *Id.*

Not surprisingly, once agreement had been reached, the floor debates on March 27 and March 28, 1996, primarily explained what had already taken place. S.2929-95 and H.2971-3028. For example, in his opening statement, Senator McCain described the President's "cancellation authority" as the power "to surgically eliminate Federal budget obligations," which "automatically rescinds the [discretionary budget] funds;" and for an item of new direct spending or a limited tax benefit, he observed "the cancellation renders the provision void, such that the obligation of the United States has no legal force or effect." S.2930.

Senator Stevens, an earlier doubter but an eventual convert, described the bill as "the most significant delegation of authority by the Congress to the President since the Constitution was ratified in 1789 . . .

It is a major, major, change in the policy of the Congress toward the executive branch." S.2955. He further called the veto "a major change in the balance of Government power. It is really a check on the check of the checks and balances." S.2957. Other major supporters of S. 4 echoed the same theme. Senator Gramm said that there is "no doubt about it —and the distinguished Senator from West Virginia [line item veto opponent and plaintiff Senator Byrd] is right—it changes the balance of power between the Congress and the President in one fundamental way: It gives the President enhanced power to say 'no' to spending." S.2960. Another strong supporter, Senator Kyl, made a similar point: "Make no mistake about it, this bill will shift a great deal of new power to the President." S.2978.

One last effort was made to stop the bill on the Senate floor. Senator Byrd moved to recommit the Conference Report with instructions to substitute S. 14 in its place. S.2949. The motion was tabled by a vote of 58 to 42, and the bill passed 69-31. S.2995.

The proceedings on the House floor also produced an unsuccessful attempt to recommit, H.3024-25, which failed by a vote of 192-228, followed by a final passage of 328 to 91 H.3028. On April 9, 1996, President Clinton signed the Line Item Veto Act of 1996. *See* Public Law 104-130, 110 Stat. 1200 (1996).

EXECUTIVE OFFICE OF THE PRESIDENT
Office of Management and Budget
Washington, D.C.

THE DIRECTOR September 11, 1995

Honorable Robert Dole
Majority Leader
United States States
Washington, D.C. 20510

Dear Mr. Leader:

Now that the House has finally appointed conferees, I am writing to urge Congress to complete action on line-item veto legislation by the beginning of FY 1996 and to make the authority applicable to all spending bills for that year.

Since House and Senate passage of line-item veto legislation more than 5 months ago, the President has repeatedly urged Congress to complete work quickly, so he can use item veto authority—this year—to curb wasteful spending.

We are, of course, pleased that the House appointed conferees last week and voted to instruct conferees to make the authority applicable to FY 1996 appropriations measures. But Congress must act quickly to make this authority effective. We must not let another year go by without giving the President authority to eliminate special interest provisions which waste increasingly scarce public resources.

In his May 8 letter to Majority Leader Dole and Speaker Gingrich, the President stated that "the House-passed bill is much stronger—and more work-

able." To expedite completion of this important legislation, the President asked that I provide you with our recommendations for a few technical improvements to the House bill.

First, while the House bill has a strong rescission mechanism, its ability to save money could be further enhanced by: (i) adopting a more workable definition of targeted tax benefit, along the lines of the Senate version; and (ii) adopting the Senate position on extending rescission authority to new direct spending.

Second, with regard to targeted tax benefits—the Justice Department strongly urges that the House bill use the terms "deny the availability of" and "suspend," in lieu of "veto" and "repeal"; and the Treasury Department urges that a provision be added to authorize the IRS to take enforcement action against individuals or entities seeking to use a targeted tax benefit when that benefit has been suspended.

Three additional technical recommendations are: (i) enhance the ability of the Administration to review carefully all tax and spending provisions by increasing the window for transmittal of special messages from 10 days to 20 days; (ii) include a severability provision in the legislation; and (iii) delete the 3-judge court judicial review mechanism but retain the requirement for expedited consideration (considerable litigation experience has shown that 3-judge courts are often inefficient and cumbersome and can actually cause considerable delay).

Whatever version of the bill the conference committee chooses to report, I offer the technical assistance

of OMB staff to help iron out issues which arise as you move ahead with such legislation.

Again, the Administration urges you to complete action quickly on this important authority to help the President hold the line against wasteful spending.

Sincerely,

/s/ ALICE M. RIVLIN
ALICE M. RIVLIN
Director

IDENTICAL LETTERS SENT TO CONFEREES AND LEADERSHIP.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Plaintiffs hereby submit their Statement of Material Facts As To Which There Is No Genuine Issue in support of Plaintiffs' Motion for Summary Judgment.

Parties

1. Plaintiff Robert C. Byrd is a Senator from the State of West Virginia and a duly elected member of the 105th Congress. Senator Byrd's current term of service will expire on January 3, 2001.

2. Plaintiff Mark O. Hatfield was a Senator from the State of Oregon. He has represented the State of Oregon for five consecutive terms, beginning in 1967. His term of service expired and he retired from the Senate on January 3, 1997.

3. Plaintiff Carl Levin is a Senator from the State of Michigan and a duly elected member of the 105th Congress. Senator Levin's current term of service will expire on January 3, 2003.

4. Plaintiff Daniel Patrick Moynihan is a Senator from the State of New York and a duly elected mem-

ber of the 105th Congress. Senator Moynihan's current term of service will expire on January 3, 2001.

5. Plaintiff Henry A. Waxman is a Representative from the Twenty-Ninth Congressional District of California and a duly elected member of the 105th Congress.

6. Plaintiff David E. Skaggs is a Representative from the Second Congressional District of Colorado and a duly elected member of the 105th Congress.

7. Defendant Franklin D. Raines, Director of Office of Management and Budget, and defendant Robert E. Rubin, Secretary of the Treasury, have certain assigned responsibilities in executing the Act. Defendant Raines is responsible for executing the President's cancellations of budgetary and spending authority and defendant Rubin is responsible for executing the President's cancellation of "limited tax benefits."

The Line Item Veto Act of 1996

8. The Line Item Veto Act ("Act") was signed into law by President Clinton on April 9, 1996. *See* Pub. L. No. 104-130, 110 Stat. 120 (to be codified at 2 U.S.C. 681 note, 691 *et seq.*).

9. The Act became effective on January 1, 1997 and expires on January 1, 2005. 2 U.S.C. § 691 note.

10. The Act purports to give the President the authority to "cancel in whole," at any time up to five days (excluding Sundays) after signing a bill into law, any dollar amount of appropriation, any items of direct spending, or any limited tax benefit contained in that law. 2 U.S.C. § 691(a).

11. Under the Act, the President must notify Congress of a "cancellation" by submitting a "special message" within five calendar days (excluding Sun-

days) after the enactment. 2 U.S.C. § 691(a)(B). The President may send only one special message covering each bill. *Id.*

12. The Act defines "cancel" to mean "rescind" in the case of an appropriation, and "prevent . . . from having legal force or effect" in all other cases. 2 U.S.C. § 691e(4).

13. Under the Act, the President may cancel an amount, item, or benefit so long as he "determines that such cancellation will (i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest. . . ." 2 U.S.C. § 691(a).

14. The cancellation takes effect upon Congress' receipt of the special message and, in the case of a cancellation of discretionary budget authority, results in the simultaneous reduction of the dollar amount of the relevant appropriation. 2 U.S.C. § 691b.

15. The cancellation rescinds any dollar amount of discretionary budget authority or prevents items of new direct spending or limited tax benefits from having legal force or effect. 2 U.S.C. § 691e(4).

16. Both the Office of Management and Budget and the Congressional Budget Office must make designated revisions in budget estimates and reports once the period for enactment of a disapproval bill expires. 2 U.S.C. § 691c.

17. With respect to appropriations, the Act permits the President to cancel any amount stated in the law itself and also any amount separately stated in any table, chart or explanatory text in the statement of managers or in any governing committee report accompanying the law. 2 U.S.C. § 691(7) (ii).

18. Under the Act, "direct spending" is defined as "(A) budget authority provided by law (other than an

appropriation law); (B) entitlement authority; and (C) the food stamp program. 2 U.S.C. § 691e(5). The Budget Act defines "entitlement authority" to be authority (including for loans and grants) to make payments "to any person or government if, under the provisions of the law containing such authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by such law." 2 U.S.C. §§ 622(9) and 651(c)(2)(C). "Item of new direct spending" means any provision that is estimated to result in an increase in direct spending over the baseline established by the Office of Management and Budget under the Balanced Budget and Emergency Deficit Control Act of 1985. 2 U.S.C. § 691(e)(8). Decl. of Senator Moynihan ¶ 6.

19. Under the Act, a "limited tax benefit" includes any "revenue-losing provision" that provides "a Federal tax deduction, credit, exclusion or preference to 100 or fewer beneficiaries under the Internal Revenue Code of 1986 in any fiscal year," or any federal tax provision that "provides permanent or transitional relief for 10 or fewer beneficiaries" from a change in the Internal Revenue Code. 2 U.S.C. § 691e(9); *see also* Decl. of Senator Moynihan ¶ 12.

20. Each special message transmitted by the President is referred to the appropriate Congressional committees. Congress may within thirty days pass a "disapproval bill" disapproving one or more cancellations. A disapproval bill must be enacted into law under the procedures proscribed by Article I, section 7 of the Constitution: bicameral passage, presentment to the President, and a 2/3 vote by Congress to override a Presidential veto. 2 U.S.C. §§ 691d, 691e(6).

21. Only if a disapproval bill is enacted into law are Presidential cancellations nullified. 2 U.S.C. § 691b(a).

22. The Act provides that any Member of Congress adversely affected by the Act may bring an action in this Court for declaratory and injunctive relief "on the ground that any provision of this part violates the Constitution." 2 U.S.C. § 692(a).

The Budget Calendar for 1997

23. Section 300 of the Congressional Budget Act of 1974 establishes the following timetable for the congressional budget process in a fiscal year:

On or before:	Action to be completed:
First Monday in February	President submits his budget
February 15	Congressional Budget Office submits report to the Budget Committees
February 25	Committees submit views and estimates to Budget Committees.
April 1	Senate Budget Committee reports concurrent resolution on the budget.
April 15	Congress completes action on concurrent resolution on the budget.

May 15	Annual appropriation bills may be considered in the House.
June 10	House Appropriations Committee reports last annual appropriation bill.
June 15	Congress completes action on reconciliation legislation.
June 30	House completes action on annual appropriation bills.
October 1	Fiscal year begins.

24. Budget negotiations and the work of the Committee on Appropriations begins when the President submits his budget on the first Monday in February. Subcommittees of the two Committees on Appropriations will schedule hearings in February to hear testimony from departmental and agency officials. By April 1, the Senate Budget Committee will report a concurrent resolution on the budget. The annual budget resolution distributes total budgetary authority among committees in the two Houses, including the Senate and House Committees on Appropriations. With those allocations, the two appropriations committees will distribute budget authority and outlays among their subcommittees, and the process of marking up appropriations bills will begin. Floor activity will begin in the House in May and June. Formal Senate mark up of bills will begin when they are received from the House. Decl. of Senator Byrd ¶ 16.

25. Thus, by late spring and certainly by early summer, votes on appropriations bills subject to the Line Item Veto Act will be cast first at the committee level in each House, and then on the floors of the two chambers. During September, votes on final passage of appropriations bills will occur in both chambers in order to complete action before the beginning of the fiscal year on October 1. *See* Decl. of Senator Byrd ¶ 16.

26. Within the next three to four weeks, the House Appropriations Committee will receive requests for supplemental appropriations for the current fiscal year. Decl. of Representative Skaggs ¶ 5. These requests will deal with national security matters, disaster relief, and forest fire fighting, and will require immediate attention by the Appropriations Committee. Thus, it is very likely that negotiations and votes on supplemental appropriations bills subject to the Line-Item Veto Act will have occurred even before this case is set for oral argument on March 21, 1997, and will continue thereafter. *Id. See also* Decl. of Senator Byrd ¶ 17.

Respectfully submitted,

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Date: January 27, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 97-0001 (TPJ)

SENATOR ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, ET AL., DEFENDANTS

DEFENDANTS' STATEMENT OF GENUINE ISSUE

In accordance with Rule 108(h) of the Rules of this Court, defendants state that there are no material facts as to which they contend there exists a genuine issue necessary to be litigated. However, defendants dispute the following al egations in Plaintiffs' Statement of Material Facts as to Which There is No Genuine Issue ["Pl. Stat."]:

1. Defendants dispute plaintiffs' allegation that defendant Rubin "is responsible for executing the President's cancellation of 'limited tax benefits.'" Pl. Stat., ¶7. The Line Item Veto Act assigns no responsibilities to defendant Rubin. 2 U.S.C. 681 note, 691 *et seq.*

2. Defendants dispute plaintiffs' allegations that specified actions by the Legislative and Executive Branches on appropriations "will" occur or are "very likely" to occur by specified dates. Pl. Stat., ¶¶24-26. The declarations upon which plaintiffs' allegations are based represent only the declarants' personal

projections about these actions. Declaration of Senator Robert C. Byrd, dated January 24, 1977, ¶¶16-17; Declaration of David Skaggs, dated January 25, 1977, ¶¶4-5.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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SENATOR ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, ET AL., DEFENDANTS

STATEMENT OF MATERIAL FACTS AS TO WHICH DEFENDANTS' CONTEND THERE IS NO GENUINE ISSUE

In accordance with Rule 108(h) of the Rules of this Court, defendants state that there is no genuine issue as to the following material facts:

1. The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200, to be codified at 2 U.S.C. 681 note, 691 *et seq.*, was enacted on April 9, 1996, and will expire on January 1, 2005.

2. Defendants have not taken any actions pursuant to the Line Item Veto Act.

3. The President has not exercised the cancellation authority conferred on him by the Line Item Veto Act.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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Civ. Action No. 97-0001(TPJ)

SENATOR ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH DEFENDANTS' CONTEND THERE IS NO GENUINE ISSUE

The parties agree that there are no material facts as to which there is a genuine issue that preclude resolution of the legal issues on summary judgment. Pursuant to Local Rule 108(h), plaintiffs respond to Defendants' Statement of Material Facts As To Which Defendants' Contend There Is No Genuine Issue:

1. Agreed.

2. Plaintiffs do not dispute that defendants have not taken any actions pursuant to the Line Item Veto Act. Nonetheless, plaintiffs contend that the operation of the Line Item Veto Act exerts a present, concrete injury upon them in their role as legislators. *See* Declaration of Senator Byrd ¶¶ 18-21; Declaration of Senator Levin ¶¶ 6-7; Declaration of Senator Moynihan ¶¶ 17-22; Declaration of Representative Skaggs ¶¶ 4-6.

3. Agreed.

Respectfully submitted,

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(ORDER LIST: 520 U.S.)

WEDNESDAY, APRIL 23, 1997

ORDER IN PENDING CASE

96-1671 RAINES, DIR., OMB, ET AL. v. BYRD, ROBERT C., ET AL.

The motion of the parties to expedite consideration of the appeal is granted. In this case probable jurisdiction is noted. The parties' briefs are to be filed with the Clerk of this Court and served upon opposing counsel on or before 3 p.m., Friday, May 9, 1997. Reply briefs, if any, may be filed with the Clerk of this Court and served upon opposing counsel on or before 3 p.m., Wednesday, May 21, 1997. Briefs may be submitted in compliance with Rule 33.2 to be replaced as soon as possible with briefs prepared under Rule 33.1. Rule 29.2 does not apply. Oral argument is set for Tuesday, May 27, 1997, at 10 a.m.

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 96-1671

In the Supreme Court of the United States

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL., APPELLANTS

v.

ROBERT C. BYRD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

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43

QUESTIONS PRESENTED

The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (to be codified at 2 U.S.C. 691 *et seq.*), gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The questions presented are as follows:

1. Whether individual Members of Congress have standing to challenge the constitutionality of the Act.

2. Whether the Act violates Article I of the Constitution.

PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are Franklin D. Raines, the Director of the Office of Management and Budget, and Robert E. Rubin, the Secretary of the Treasury. The appellees here, who were the plaintiffs below, are Senator Robert C. Byrd, Senator Daniel Patrick Moynihan, Senator Carl Levin, former Senator Mark O. Hatfield, Representative David E. Skaggs, and Representative Henry A. Waxman.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional and statutory provisions involved	1
Statement	2
Summary of argument	15
Argument:	
I. Appellees lack standing to challenge the constitutionality of the Line Item Veto Act	18
A. Members of Congress will suffer no judicially cognizable injury as a result of the implementation of the Line Item Veto Act	20
B. Because the President has not yet exercised his cancellation authority under the Line Item Veto Act, appellees can identify no actual or imminent injury	30
II. The Line Item Veto Act does not violate Article I of the Constitution	33
A. The Act does not conflict with the constitutional requirement that the President approve or disapprove *in toto* a bill presented to him by Congress	33
B. The Act is consistent with the historical understanding of Congress's power to confer spending discretion on the Executive Branch	38
C. The Act does not delegate legislative power to the President	40
Conclusion	51
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Addison v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944) 47
Allen v. *Wright*, 468 U.S. 737 (1984) 18, 19
American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946) 42
Arizonans for Official English v. *Arizona*, 117 S. Ct. 1055 (1997) 26
Bender v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) 22, 27-28
Bennett v. *Spear*, No. 95-813 (Mar. 19, 1997) 18
Bowsher v. *Synar*, 478 U.S. 714 (1986) 22, 24, 27, 39
Buckley v. *Valeo*, 424 U.S. 1 (1976) 25, 27
Cheng Fan Kwok v. *INS*, 392 U.S. 206 (1968) 26
Chicago & Grand Trunk Ry. v. *Wellman*, 143 U.S. 339 (1892) 19
Cincinnati Soap Co. v. *United States*, 301 U.S. 308 (1937) 38, 43
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983) 30
City of New Haven v. *United States*:
634 F. Supp. 1449 (D.D.C. 1986), aff'd, 809 F.2d 900 (D.C. Cir. 1987) 6
809 F.2d 900 (D.C. Cir. 1987) 7
Coleman v. *Miller*, 307 U.S. 433 (1939) 21, 28, 29
Debs, In re, 158 U.S. 564 (1895) 21
Diamond v. *Charles*, 476 U.S. 54 (1986) 21
Director, OWCP v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995) 21
Dugan v. *Rank*, 372 U.S. 609 (1963) 21
FEA v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976) 42, 44
FEC v. *NRA Political Victory Fund*, 513 U.S. 88 (1994) 28

Cases—Continued:

	Page
FPC v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)	42, 43
Field v. *Clark*, 143 U.S. 649 (1892)	41, 42, 46, 47, 48, 49
Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. 91 (1979)	18
Goodyear Atomic Corp. v. *Miller*, 486 U.S. 174 (1988)	50
Hafer v. *Melo*, 502 U.S. 21 (1991)	21
Heckler v. *Chaney*, 470 U.S. 821 (1985)	49
Henderson v. *United States*, 116 S. Ct. 1638 (1996)	49
Hunt v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)	24
INS v. *Chadha*, 462 U.S. 919 (1983)	*passim*
Intermountain Rate Cases, 234 U.S. 476 (1914)	47
J.W. Hampton, Jr., & Co. v. *United States*, 276 U.S. 394 (1928)	25, 42
Karcher v. *May*, 484 U.S. 72 (1987)	22, 29
Kentucky v. *Graham*, 473 U.S. 159 (1985)	21
La Abra Silver Mining Co. v. *United States*, 175 U.S. 423 (1899)	35
Laird v. *Tatum*, 408 U.S. 1 (1972)	19
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994)	31
Lichter v. *United States*, 334 U.S. 742 (1948)	42, 43
Lincoln v. *Vigil*, 508 U.S. 182 (1993)	3, 38, 43
Loving v. *United States*, 116 S. Ct. 1737 (1996)	41, 42
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	19, 23, 30
Marsh v. *Chambers*, 463 U.S. 783 (1983)	39
McGrain v. *Daugherty*, 273 U.S. 135 (1927)	27
Metropolitan Washington Airports Auth. v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991)	25, 32

Cases—Continued: Page

Miles v. *Apex Marine Corp.*, 498 U.S. 19 (1990) 50
Mistretta v. *United States*, 488 U.S. 361 (1989) 38, 41, 42, 45
Moore v. *U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985) 24, 29
Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) 45
Muskrat v. *United States*, 219 U.S. 346 (1911) 33
NBC v. *United States*, 319 U.S. 190 (1943) 42, 43
National Treasury Employees Union v. *United States*, 101 F.3d 1423 (D.C. Cir. 1996) 12
New York Central Securities Corp. v. *United States*, 287 U.S. 12 (1932) 42, 43
OPM v. *Richmond*, 496 U.S. 414 (1990) 43
Ornelas v. *United States*, 116 S. Ct. 1657 (1996) 26
Powell v. *McCormack*, 395 U.S. 486 (1969) 22
Reno v. *Catholic Social Servs., Inc.*, 509 U.S. 43 (1993) 30
SEC v. *United States Realty & Improvement Co.*, 310 U.S. 434 (1940) 21
Santobello v. *New York*, 404 U.S. 257 (1971) 49
Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) 23, 24
Sibbach v. *Wilson & Co.*, 312 U.S. 1 (1941) 49
Sierra Club v. *Morton*, 405 U.S. 727 (1972) 19
Simon v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976) 18, 32
Skinner v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989) 42
Synar v. *United States*, 626 F. Supp. 1374 (D.D.C.), aff'd *sub nom. Bowsher* v. *Synar*, 478 U.S. 714 (1986) 42, 49
The Pocket Veto Case, 279 U.S. 655 (1929) 34, 38, 40

Cases—Continued: Page

Touby v. *United States*, 500 U.S. 160 (1991) 41, 42, 47
Train v. *City of New York*, 420 U.S. 35 (1975) 7, 19, 20
United States v. *Ballin*, 144 U.S. 1 (1892) 27
United States v. *Lovett*, 328 U.S. 303 (1946) 26
United States v. *Munoz-Flores*, 495 U.S. 385 (1990) 24
United States v. *Richardson*, 418 U.S. 166 (1974) .. 23
United States v. *Will*, 449 U.S. 200 (1980) 35
United States Nat'l Bank of Oregon v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439 (1993) .. 33
Valley Forge Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 18, 19
Whitmore v. *Arkansas*, 495 U.S. 149 (1990) 13, 18, 30
Yakus v. *United States*, 321 U.S. 414 (1944) 42, 43
Young v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) 25, 26
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 38

Constitution and statutes:

U.S. Const.:
Art. I 16, 19, 33, 40, 41, 45, 46, 47
§ 1 41
§ 5 29
§ 7:
Cl. 2 (Presentment Clause) ..... *passim*, 1a
Cl. 3 (Presentment Clause) 33
§ 8, Cl. 1 (Spending Clause) 38
§ 9, Cl. 7 43
Art. II 15, 20, 25, 40, 41, 45, 48
§ 3 25
Art. III 14, 18, 19, 20
Act of Sept. 11, 1789, ch. 13, §§ 1-2, 1 Stat. 67-68 39

Statutes—Continued: Page

Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95 ..... 2, 3, 39
Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104 2
Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190 2
Act of Mar. 3, 1809, ch. 28, § 1, 2 Stat. 535-536 4
Act of May 31, 1830, ch. 719, § 2, 4 Stat. 425 48
Act of Mar. 6, 1866, ch. 12, § 2, 14 Stat. 4 49
Act of July 12, 1870 (Antideficiency Act), ch. 251, § 7, 16 Stat. 251 4
Act of Oct. 1, 1890 (Tariff Act), ch. 1244, § 3, 26 Stat. 612 46
Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257-1258 .. 4
Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48-49 4
Act of June 30, 1932, ch. 314, §§ 401-408, 47 Stat. 413-415 5
Act of Mar. 3, 1933, ch. 212, 47 Stat. 1489:
§ 16:
47 Stat. 1517-1519 5
47 Stat. 1519 5
Act of Mar. 4, 1933, ch. 281, § 4, 47 Stat. 1602 5
Act of Sept. 29, 1987, Pub. L. No. 100-119, § 206(a), 101 Stat. 785-786 7
Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act), Pub. L. No. 99-177, Tit. II, 99 Stat. 1038 (codified at 2 U.S.C. 900 *et seq.*) 10, 22
§ 250(b), 2 U.S.C. 900(b) 10
§ 251, 2 U.S.C. 901 10
§ 251(a)(1), 2 U.S.C. 901(a)(1) 10
§ 251A(a), 2 U.S.C. 901a(a) 10
§ 252, 2 U.S.C. 902 10
§ 252(b), 2 U.S.C. 902(b) 10
§ 254(g), 2 U.S.C. 904(g) 10
§ 254(h), 2 U.S.C. 904(h) 10
§ 256(*l*), 2 U.S.C. 906(*l*) 10
§ 257, 2 U.S.C. 907 9
Budget Enforcement Act of 1990, Pub. L. No. 101-508, Tit. XIII, 104 Stat. 1388-573 10

Statutes—Continued: Page

Controlled Substances Act, 21 U.S.C. 801 *et seq.* 48
Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 306(c), 110 Stat. 821-822 (to be codified at 2 U.S.C. 6085(c)) 47
Federal Water Pollution Control Act, Tit. II, 33 U.S.C. 1281 *et seq.* 7
Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 833 7
General Appropriation Act, 1951, ch. 896, 64 Stat. 595:
§ 1211:
64 Stat. 765-766 5
64 Stat. 766 5
§ 1214, 64 Stat. 768 5
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 303(b)(2), 110 Stat. 3009-586 36
Impoundment Control Act of 1974, Pub. L. No. 93-344, Tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. 681 *et seq.*) 7
§ 1002, 88 Stat. 332 (31 U.S.C. 665 (1976) (repealed)) 8
§ 1011(1), 2 U.S.C. 682(1) 7
§ 1011(3), 2 U.S.C. 682(3) 7
§ 1012, 2 U.S.C. 683 (1982) 7
§ 1013, 2 U.S.C. 684 (1982) 7
§ 1021(a), 2 U.S.C. 691(a) 8, 35, 44
§ 1021(a)(A), 2 U.S.C. 691(a)(A) 11, 44
§ 1021(a)(B), 2 U.S.C. 691(a)(B) 10
§ 1021(b), 2 U.S.C. 691(b) 45
§ 1021(b)(1), 2 U.S.C. 691(b)(1) 11
§ 1021(c), 2 U.S.C. 691(c) 11
§ 1022(b), 2 U.S.C. 691a(b) 11, 45
§ 1022(c)(1), 2 U.S.C. 691a(c)(1) 10
§ 1023(a), 2 U.S.C. 691b(a) 11
§ 1023(b), 2 U.S.C. 691b(b) 10
§ 1024, 2 U.S.C. 691c 10
§ 1024(a), 2 U.S.C. 691c(a) 10

Statutes—Continued: Page

§ 1024(a)(1)(B), 2 U.S.C. 691c(a)(1)(B) 10
§ 1024(a)(2)(B), 2 U.S.C. 691c(a)(2)(B) 10
§ 1024(b), 2 U.S.C. 691c(b) 10
§ 1025, 2 U.S.C. 691d 11
§ 1026(4)(A), 2 U.S.C. 691e(4)(A) 9
§ 1026(4)(A)-(C), 2 U.S.C. 691e(4)(A)-(C) 48
§ 1026(4)(B), 2 U.S.C. 691e(4)(B) 9
§ 1026(4)(C), 2 U.S.C. 691e(4)(C) 9
§ 1026(5), 2 U.S.C. 691e(5) 9
§ 1026(6), 2 U.S.C. 691e(6) 11, 35
§ 1026(7)(A), 2 U.S.C. 691e(7)(A) 8
§ 1026(7)(A)(ii), 2 U.S.C. 691e(7)(A)(ii) 8
§ 1026(8), 2 U.S.C. 691e(8) 9, 45
§ 1026(9)(A), 2 U.S.C. 691e(9)(A) 9
§ 1027(a), 2 U.S.C. 691f(a) 9
§ 1027(b), 2 U.S.C. 691f(b) 9
§ 1027(c), 2 U.S.C. 691f(c) 9
Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (to be codified at 2 U.S.C. 691 *et seq.*) 2, 8
§ 2, 110 Stat. 1200-1211 (2 U.S.C. 691-691f) 8
§ 3(a)(1), 110 Stat. 1211 (2 U.S.C. 692(a)(1)) 13, 14
§ 3(b), 110 Stat. 1211 (2 U.S.C. 692(b)) 1
§ 3(c), 110 Stat. 1211 (2 U.S.C. 692(c)) 14
§ 5, 110 Stat. 1212 (2 U.S.C. 691 note) 8, 36
Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, 82 Stat. 251:
§ 202(a), 82 Stat. 271-272 6
§ 202(b), 82 Stat. 272 6
§ 203(a), 82 Stat. 272 6
§ 203(b), 82 Stat. 272 6
Second Supplemental Appropriations Act, 1969, Pub. L. No. 91-47, § 401, 83 Stat. 82 6
Second Supplemental Appropriations Act, 1970, Pub. L. No. 91-305, 84 Stat. 376:
§ 401, 84 Stat. 405-406 6
§ 501, 84 Stat. 406-407 6
Securities Exchange Act of 1934, 15 U.S.C. 78*l*(h) 47
Shipping Act of 1984, 46 U.S.C. App. 1708(e) 36

Statutes—Continued: Page

2 U.S.C. 288b(b) 27
5 U.S.C. 5303(b)(1) 47
5 U.S.C. 5304a(a) 47
10 U.S.C. 7309(b) 47
28 U.S.C. 2072(b) 49
47 U.S.C. 227(b)(2) 48

Miscellaneous:

Ralph S. Abascal & John R. Kramer: *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 Geo. L.J. 1549 (1974) 2, 4, 5
Presidential Impoundment Part II: Judicial and Legislative Responses, 63 Geo. L.J. 149 (1974) 6
89 Cong. Rec. 10,362 (1943) 3
Correspondence of the Justices, *reprinted in* 3 *The Correspondence and Public Papers of John Jay* (H. Johnston ed. 1891) 33
Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 Law & Contemp. Probs. 135 (1972) 4, 5-6
H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. (1996) 8, 9, 10, 11, 35, 44
H.R. Rep. No. 1797, 81st Cong., 2d Sess. (1950) 3
Senate Comm. on the Budget, 104th Cong., 2d Sess., *The Congressional Budget Process: An Explanation* (Comm. Print 1996) 37
Nile Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 Neb. L. Rev. 1 (1974) 6
9 Weekly Comp. Pres. Doc. 110 (1973) 6

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (J.S. App. 1a-29a) is to be reported at 956 F. Supp. 25.

JURISDICTION

The order of the district court was entered on April 10, 1997. A notice of appeal (J.S. App. 30a-31a) was filed on April 11, 1997. This Court noted probable jurisdiction on April 23, 1997. J.A. 108. The jurisdiction of this Court rests on Pub. L. No. 104-130, § 3(b), 110 Stat. 1211 (J.S. App. 57a) (to be codified at 2 U.S.C. 692(b)).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Presentment Clause of the United States Constitution, Art. I, § 7, Cl. 2, is reproduced as an appendix to this brief.

2. The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (to be codified at 2 U.S.C. 691 *et seq.*), is reproduced at J.S. App. 32a-59a.

STATEMENT

1. The Line Item Veto Act gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The Act is the latest in a series of statutes, dating from 1789 to the present, in which Congress has given the Executive Branch discretion over the expenditure of appropriated funds.

a. The first statute appropriating funds for the general operation of the federal government was passed by the First Congress and signed by President Washington in September 1789. See Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95. The statute appropriated "sum[s] not exceeding" specified amounts for the expenses of the War Department, government salaries, military pensions, and outstanding debt. *Ibid.* The First Congress subsequently enacted two additional general appropriations statutes, which likewise appropriated "sum[s] not exceeding" specified amounts for the government's operations. Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190. See Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 Geo. L.J. 1549, 1579 (1974).

The appropriations acts of the First Congress gave the President two distinct kinds of discretion over appropriated funds, both of which have become familiar elements of the federal budget process. First, by appropriating sums "not exceeding" specified amounts, Congress gave the President discretion not to obligate the full amount of the appropriations. It has since become a commonplace of

federal appropriations law that an appropriation "not exceeding" a specified sum leaves the Executive Branch with discretion to spend less than the full amount of the appropriation, absent some other statutory restriction on that discretion. See, *e.g.*, H.R. Rep. No. 1797, 81st Cong., 2d Sess. 9 (1950) ("Appropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity."); 89 Cong. Rec. 10,362 (1943) (Sen. Truman) ("When the Congress appropriates funds * * * none of us hold[s] that we give a mandate to expend the funds appropriated.").

Second, the appropriations acts of the First Congress provided Executive Branch departments with what are now known as "lump-sum" appropriations—that is, appropriations for the operation of a department that do not specify the particular items for which the funds are to be used. For example, the first appropriations act appropriated "a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war." Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95. The Act did not prescribe any particular expenditures to be made by the President from that appropriation. As a result, the President was given discretion not only with respect to the amount of the appropriated sum that would be used, but also with respect to its allocation within the Department of War. This Court recently reaffirmed that, "where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that [Congress] does not intend to impose legally binding restrictions" on the allocation of the funds among authorized purposes. *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993) (internal quotation marks omitted).

Within a few years, appropriations laws began to make increased use of earmarked, rather than lump-sum, appro-

priations. See Abascal & Kramer, 62 Geo. L.J. at 1579-1580. However, Congress soon recognized the continued need to provide the Executive Branch with discretion to move appropriations within departments. In 1809, Congress vested the President with recess authority "to direct * * * that a portion of the monies appropriated for a particular branch of expenditure in [a] department, be applied to another branch of expenditure in the same department." Act of Mar. 3, 1809, ch. 28, § 1, 2 Stat. 535-536. That authority remained in effect, with various modifications, for nearly 60 years. See Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 Law & Contemp. Probs. 135, 148 & nn.71-72 (1972). In addition, Congress continued to resort to lump-sum appropriations, rather than earmarked appropriations, when Executive Branch discretion and flexibility were viewed as desirable, particularly during periods of economic and military crisis. *Id.* at 136 (citing major lump-sum appropriations during Civil War, First World War, and Great Depression).

Early in the Twentieth Century, Congress began to enact laws that gave the Executive Branch standing authority to control spending on a government-wide basis. In 1905 and 1906, Congress amended the Antideficiency Act (Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251) to give agencies authority to apportion appropriations over the course of a fiscal year, while authorizing them to modify or waive apportionments in exigent circumstances. Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257-1258; Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48-49.

In 1933, in response to the fiscal pressures created by the Great Depression, Congress granted the President broad discretion to refrain from spending appropriated funds. Congress authorized the President to "reduce [governmental] expenditures" by abolishing, consolidating, or transferring Executive Branch agencies and functions.

Act of Mar. 3, 1933, ch. 212, § 16, 47 Stat. 1517-1519 (amending Act of June 30, 1932, ch. 314, §§ 401-408, 47 Stat. 413-415)). All appropriations "unexpended by reason of" the President's exercise of his reorganization authority were to be "impounded and returned to the Treasury." *Id.* at 1519. Congress also conferred discretionary impoundment authority in the Department of War's 1933 appropriations act. Congress authorized the President to impound "[a]ny sums appropriated in this Act for or on account of the Military Establishment, or any portion of such sums, that may not be needed for the purposes for which appropriated." Act of Mar. 4, 1933, ch. 281, § 4, 47 Stat. 1602.

In 1950, Congress amended the Antideficiency Act to provide the Executive Branch with general authority to establish "reserves"—that is, to withhold appropriated funds—in order "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other [post-appropriation] developments." General Appropriation Act, 1951, ch. 896, § 1211, 64 Stat. 765-766 (1950). Congress directed the Executive Branch to "recommend the rescission" of any reserves "not * * * required to carry out the purposes of the appropriation concerned." *Id.* at 766. Congress also authorized the Executive Branch to reduce spending by "at least" $550 million below appropriated levels; apart from specifying that the reductions not "impair[] national defense," Congress did not prescribe what spending to reduce or how large particular reductions should be. *Id.* § 1214, 64 Stat. 768.

During the Vietnam War, Congress gave the President still greater discretionary authority over expenditures of appropriated funds. See Abascal & Kramer, 62 Geo. L.J. at 1569 & n.90; Fisher, 37 Law & Contemp. Probs. at 160-

161. The Revenue and Expenditure Control Act of 1968 imposed strict ceilings on budget outlays and new obligation authority for fiscal year 1969. Pub. L. No. 90-364, §§ 202(a), 203(a), 82 Stat. 271-272. To meet those ceilings, Congress authorized the President to reserve as much as $6 billion in outlays and $10 billion in new obligation authority, with no restrictions on the President's discretion regarding what spending to reduce. *Id.* §§ 202(b), 203(b), 82 Stat. 272. Congress provided the President with similar authority in 1969 and 1970. See Second Supplemental Appropriations Act, 1969, Pub. L. No. 91-47, § 401, 83 Stat. 82; Second Supplemental Appropriations Act, 1970, Pub. L. No. 91-305, §§ 401, 501, 84 Stat. 405-407.

b. In each of the foregoing instances, the Executive Branch was authorized by statute to withhold appropriated sums. During the early 1970s, however, President Nixon asserted a general authority to impound appropriated funds whether or not Congress intended for the impounded appropriations to be discretionary. See, *e.g.*, 9 Weekly Comp. Pres. Doc. 110 (1973). The Nixon Administration's effort to impound appropriations for a wide range of federal programs led to a series of lawsuits challenging individual impoundments. See, *e.g.*, *City of New Haven* v. *United States*, 634 F. Supp. 1449, 1454-1455 & n.6 (D.D.C. 1986) (summarizing cases), aff'd, 809 F.2d 900 (D.C. Cir. 1987); Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part II: Judicial and Legislative Responses*, 63 Geo. L.J. 149, 151-168 (1974); Nile Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 Neb. L. Rev. 1, 14-30 (1974).

The courts resolved disputes over Executive Branch impoundments by construing the applicable appropriations statutes to determine whether Congress intended for the President to have discretion over expenditure of the

impounded funds. For example, in *Train* v. *City of New York*, 420 U.S. 35 (1975), this Court held that the President lacked authority to impound funds appropriated for grants under Title II of the Federal Water Pollution Control Act, as added by Pub. L. No. 92-500, § 2, 86 Stat. 833. The Court reviewed the text and history of the Act to determine whether "Congress intended to confer any discretion on the Executive to withhold funds from this program." 420 U.S. at 44. The Court and the parties presupposed that Congress could, if it chose, vest the Executive Branch with such discretion; the only issue was whether it had chosen to do so.

In response to the impoundment controversy, Congress enacted the Impoundment Control Act of 1974 (ICA), Pub. L. No. 93-344, Tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. 681 *et seq.*). The ICA distinguished between two forms of impoundment: deferrals (delays in spending during the course of a fiscal year, or other period of availability) and rescissions (permanent withholdings of appropriated funds). See 2 U.S.C. 682(1), 682(3). The Act authorized the President to carry out deferrals, subject to a one-House legislative veto. 2 U.S.C. 684 (1982).[1] The Act prohibited the President from engaging in unilateral rescissions. Instead, it authorized the President to propose rescissions to Congress under a mechanism for expedited legislative consideration. 2 U.S.C. 683 (1982). In addition, the Act amended the Antideficiency Act to narrow the circumstances in which the Executive Branch

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[1] This Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983), made clear that the ICA's legislative veto provision was unconstitutional. See *City of New Haven* v. *United States*, 809 F.2d 900, 905 (D.C. Cir. 1987) (government conceded unconstitutionality of legislative veto provision). Congress subsequently amended the Act to eliminate that provision. Act of Sept. 29, 1987, Pub. L. No. 100-119, § 206(a), 101 Stat. 785-786.

could place appropriated funds in reserves. See ICA § 1002, 88 Stat. 332.

2. The Line Item Veto Act was enacted in April 1996 as an amendment to the ICA. See Pub. L. No. 104-130, 110 Stat. 1200 (J.S. App. 32a-59a) (to be codified at 2 U.S.C. 691 *et seq.*). The Act expires on January 1, 2005. Pub. L. No. 104-130, § 5, 110 Stat. 1212 (J.S. App. 59a). It authorizes the President to "cancel in whole" specific spending and revenue items contained in any bill or joint resolution "that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States." ICA § 1021(a) (2 U.S.C. 691(a)); J.S. App. 32a.[2]

The President's cancellation authority extends to three categories of budget items: (1) "dollar amount[s] of discretionary budget authority," (2) "item[s] of new direct spending," and (3) "limited tax benefit[s]." ICA § 1021(a) (2 U.S.C. 691(a)); J.S. App. 32a-33a. A "dollar amount of discretionary budget authority" is "the entire dollar amount of budget authority" that is specified in an appropriations law or is otherwise specified, represented, or required to be spent. ICA § 1026(7)(A) ((2 U.S.C. 691e(7)(A)); J.S. App. 50a-51a.[3] An "item of new direct spending" is a

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[2] Section 2 of the Line Item Veto Act added a new Part C to the ICA. The citations in the text to "ICA §" are to Sections contained in the new Part C.

[3] A "dollar amount of discretionary budget authority" includes any amount "represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying [an appropriations] law." ICA § 1026(7)(A)(ii) (2 U.S.C. 691e(7)(A)(ii)); J.S. App. 50a. That provision "is not intended to give increased legal weight or authority to documents that accompany the law that is enacted." H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 32 (1996). Rather, Congress "is choosing to use those documents as a means of allowing the President increased discretion to reduce dollar amounts of discretionary budget authority provided in an appropriation law." *Ibid.*

specific provision that will result in "an increase in budget authority or outlays" for entitlements, food stamps, or other programs funded other than through annual appropriations. ICA § 1026(8) (2 U.S.C. 691e(8)); J.S. App. 51a.[4] A "limited tax benefit" is a revenue-losing provision that gives a tax reduction to 100 or fewer beneficiaries, or a provision that provides "temporary or pemanent transitional relief" to ten or fewer beneficiaries. ICA § 1026(9)(A) (2 U.S.C. 691e(9)(A)); J.S. App. 52a-54a.[5]

Cancellation of a dollar amount of discretionary budget authority operates "to rescind" that authority. ICA § 1026(4)(A) (2 U.S.C. 691e(4)(A)); J.S. App. 48a. Cancellation of an item of new direct spending or a limited tax benefit renders the cancelled spending or revenue provision without "legal force or effect." ICA § 1026(4)(B) and (C) (2 U.S.C. 691e(4)(B) and(C)); J.S. App. 48a-49a. The President may not use funds covered by a cancellation for

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[4] The Act defines the term "direct spending" to include "(A) budget authority provided by law (other than an appropriation law); (B) entitlement authority; and (C) the food stamp program." ICA § 1026(5) (2 U.S.C. 691e(5)); J.S. App. 49a. An "item of new direct spending" is a provision of law estimated to result in direct spending in excess of the "baseline" levels calculated pursuant to Section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. 907. See ICA § 1026(8) (2 U.S.C. 691e(8)); J.S. App. 51a; see also H.R. Conf. Rep. No. 491, *supra*, at 36. An increase in outlays for such entitlements resulting from automatic cost-of-living or comparable adjustments under *existing* law is in the "baseline" and therefore is not an item of "new" direct spending under the Line Item Veto Act.

[5] The Act provides for the Joint Committee on Taxation to identify limited tax benefits in future revenue bills. ICA § 1027(a) (2 U.S.C. 691f(a)); J.S. App. 54a. If Congress incorporates the Joint Committee's statement into a revenue law as finally enacted, the President's authority to cancel limited tax benefits is confined to the items, if any, identified in that law. ICA § 1027(b) and (c) (2 U.S.C. 691f(b) and (c)); J.S. App. 55a-56a.

any purpose other than deficit reduction. ICA §§ 1023(b), 1024 (2 U.S.C. 691b(b), 691c); J.S. App. 36a-39a. Deficit reduction is accomplished through a statutory "lockbox" procedure, under which the Director of the Office of Management and Budget (OMB) must calculate the deficit reduction from the cancellation and "lock in" the savings by adjusting the calculations submitted to Congress under the Gramm-Rudman-Hollings Act. ICA § 1024(a) and (b) (2 U.S.C. 691c(a) and (b)); J.S. App. 37a-38a.[6]

If the President wishes to exercise his cancellation authority, he must submit a special message to Congress within five calendar days (excluding Sundays) after the enactment of the law containing the cancelled item. ICA §§ 1021(a)(B), 1022(c)(1) (2 U.S.C. 691(a)(B), 691a(c)(1)); J.S.

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[6] The "lockbox" operates through the pre-established procedures in the Balanced Budget and Emergency Deficit Control Act of 1985, as amended (particularly by the Budget Enforcement Act of 1990 (BEA)), which is codified at 2 U.S.C. 900 *et seq*. The BEA imposed limits ("caps") on the annual amount of discretionary appropriations, 2 U.S.C. 901, and also imposed what is commonly referred to as a "pay-as-you-go" ("paygo") requirement for legislation affecting direct spending and receipts, 2 U.S.C. 902. A failure by Congress to stay within the discretionary "caps" and the "paygo" limitation results in a "sequester," or cancellation, of budgetary resources in excess of the caps or limitation. 2 U.S.C. 900(b), 901(a)(1), 901a(a), 902(b), 906(*l*). OMB prepares the reports on which the sequester orders are based. 2 U.S.C. 904(g) and (h). Under the Line Item Veto Act's "lockbox" provision, the President's cancellation of a dollar amount of discretionary budget authority requires OMB to reduce the discretionary caps by the same amount. ICA § 1024(a)(1)(B) (2 U.S.C. 691c(a)(1)(B)); J.S. App. 37a. When the President cancels an item of direct spending or a limited tax benefit, OMB does not include the savings from that cancellation in its "paygo" calculations. ICA § 1024(a)(2)(B) (2 U.S.C. 691c(a)(2)(B)); J.S. App. 38a. See H.R. Conf. Rep. No. 491, *supra*, at 23-24. The "lockbox" provision thereby operates to permanently reduce the amounts of budgetary resources which Congress can thereafter appropriate in any one fiscal year without triggering a sequester.

App. 33a, 35a-36a. The President may cancel an item only if he determines that doing so will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." ICA § 1021(a)(A) (2 U.S.C. 691(a)(A)); J.S. App. 33a. The President must also consider "the legislative history, construction, and purposes of the law" containing the items, as well as "any specific sources of information referenced in such law." ICA § 1021(b)(1) and (2) (2 U.S.C. 691(b)(1) and (2)); J.S. App. 33a. In addition, the President's special message to Congress must identify, *inter alia*, the reasons for the cancellation; the President's estimate of the "fiscal, economic, and budgetary effect" of the cancellation; his estimate of "the * * * effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided"; and the geographic distribution of the cancelled spending. ICA § 1022(b) (2 U.S.C. 691a(b)); J.S. App. 34a-35a.

A cancellation takes effect upon Congress's receipt of the President's special message. ICA § 1023(a) (2 U.S.C. 691b(a)); J.S. App. 36a. The Act provides for highly expedited legislative consideration of "disapproval bills." ICA §§ 1025, 1026(6) (2 U.S.C. 691d, 691e(6)); J.S. App. 39a-47a, 49a-50a. If a disapproval bill is enacted into law, all disapproved cancellations become null and void and the cancelled items become effective. ICA § 1023(a) (2 U.S.C. 691b(a)); J.S. App. 36a. A disapproval bill is not subject to the President's cancellation authority under the Act. ICA § 1021(c) (2 U.S.C. 691(c)); J.S. App. 34a.

Although the Line Item Veto Act establishes general rules for the execution of appropriations laws, nothing in the Act purports to prevent Congress from exempting any future spending or revenue bill from the operation of the Act by including a provision to that effect in the bill itself.

3. The Act took effect on January 1, 1997. See J.S. App. 2a, 58a-59a. Appellees—six Members of Congress, one of whom has since left office—filed the present suit the next day.[7] They named as defendants Franklin D. Raines, the Director of OMB, and Robert E. Rubin, the Secretary of the Treasury. J.A. 9-10; see J.S. App. 2a.[8] Appellees alleged that "the Act confers on the President powers of veto, revision, and repeal of federal law that violate Article I of the Constitution." J.A. 10. They further alleged that the Act "directly and concretely injures" them by "altering the legal and practical effect" of their votes, by "divesting" them of "their constitutional role in the repeal of legislation," and by "altering the constitutional balance of powers between the Legislative and Executive Branches." J.A. 12. The complaint did not allege, however, that the President had exercised his cancellation authority under the Act, and he has not yet done so.

The government moved to dismiss for lack of jurisdiction, and the parties thereafter filed cross-motions for summary judgment. The Senate and the House of Representatives jointly appeared as *amici curiae* to support the constitutionality of the Act. See J.S. App. 2a-3a. On April 10, 1997, the district court issued a memorandum order

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[7] A similar constitutional challenge was brought by a federal labor union immediately after the Act was signed into law in April 1996. That action was dismissed on standing and ripeness grounds. See *National Treasury Employees Union* v. *United States*, 101 F.3d 1423 (D.C. Cir. 1996).

[8] Appellees alleged that "defendant Raines is responsible for executing the President's cancellations of budgetary and spending authority under the Act," and that "defendant Rubin is responsible for executing the President's cancellations of 'limited tax benefits' under the Act and for executing and enforcing the tax laws of the United States." J.A. 11.

denying the motion to dismiss and granting summary judgment to appellees. J.S. App. 1a-29a.

The district court first held that appellees had standing to bring their suit. J.S. App. 9a-12a. The court relied on prior D.C. Circuit decisions holding that Members of Congress have "standing to challenge measures that affect their constitutionally prescribed lawmaking powers," although it recognized that "the Supreme Court has never endorsed the Circuit's analysis of standing in such cases." *Id.* at 10a-11a. Applying those circuit precedents, the district court held that "[appellees'] claim of injury in this case, namely, that the Act dilutes their Article I voting power, is likewise of the kind that suffices to confer standing under Article III." *Id.* at 11a. By virtue of the Act, the court explained, "[appellees'] votes mean something different from what they meant before, for good or ill, and [appellees] who perceive it as the latter are thus 'injured' in a constitutional sense whenever an appropriations bill comes up for a vote, whatever the President ultimately does with it." *Id.* at 11a-12a.

The district court also held that appellees' claims were ripe for adjudication, despite the fact that the President had not yet exercised any cancellation authority under the Act. J.S. App. 12a-15a. The court explained that, "[b]ecause [appellees] now find themselves in a position of unanticipated and unwelcome subservience to the President before and after they vote on appropriations bills, Article III is satisfied." *Id.* at 14a. The court noted as well that "the budgetary process is already underway," and that "appropriations votes are inevitable, and 'certainly impending.'" *Ibid.* (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)).[9]

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[9] Section 3(a)(1) of the Line Item Veto Act expressly authorizes suits by Members of Congress challenging the constitutionality of any

On the merits, the district court held that the Line Item Veto Act violates the Presentment Clause (U.S. Const. Art. I, § 7, Cl. 2) by delegating to the President the legislative power to repeal Acts of Congress. J.S. App. 16a-29a. The court acknowledged that any appropriations law whose provisions are subject to the President's cancellation power under the Act "will have been 'approved' in accordance with the Presentment Clause." *Id.* at 20a. The court concluded, however, that, "following approval [of an appropriations bill], a cancellation by the President is a legislative repeal that itself must comply with Presentment Clause procedures." *Ibid.* The court reasoned:

> Where the President signs a bill but then purports to cancel parts of it, he exceeds his constitutional authority and prevents both Houses of Congress from participating in the exercise of lawmaking authority. The President's cancellation of an item unilaterally effects a repeal of statutory law such that the bill he signed is not the law that will govern the Nation. That is precisely what the Presentment Clause was designed to prevent.

Id. at 21a-22a.

The district court recognized that the President may be vested with discretionary authority to impound, or to decline to spend, funds previously appropriated by Congress. J.S. App. 22a-23a. However, the court stated that cancellation under the Act "is simply not the same

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provision of the Act. J.S. App. 56a (2 U.S.C. 692(a)(1)). Section 3(c) of the Act directs both the district court and this Court to expedite disposition of such suits "to the greatest possible extent." *Id.* at 57a (2 U.S.C. 692(c)). The district court construed those provisions as rendering inapplicable any prudential constraints on the court's exercise of jurisdiction, leaving only the requirements of Article III. See *id.* at 9a n.5, 14a n.8, 16a.

thing as impoundment," but instead "is equivalent to repeal" of the underlying appropriations law. *Id.* at 24a-25a. The court sought to distinguish the Act from statutes previously upheld by this Court under the nondelegation doctrine on the ground that, in its view, the Act "hands off to the President authority over fundamental legislative choices" and "spares Congress the burden of making those vexing choices of which programs to preserve and which to cut." *Id.* at 27a.

SUMMARY OF ARGUMENT

I. Because the implementation of the Line Item Veto Act will cause appellees no judicially cognizable injury, they lack standing to sue in this case. This Court has consistently held that a generalized interest in the proper application of the Constitution and laws is an insufficient basis for invoking the power of the federal courts. Because Members of Congress exercise their official powers on behalf of the people, the President's cancellation of budgetary items pursuant to the Line Item Veto Act would cause them no personal injury that is not shared by the public generally.

Nor do appellees have standing to sue on behalf of the government. Because Article II of the Constitution entrusts litigation on behalf of the United States to the Executive rather than the Legislative Branch, neither Congress nor its Members may initiate litigation designed to vindicate the general public and governmental interest in the proper administration of federal law. Even if the Line Item Veto Act could be said to impair a distinct institutional interest of Congress itself, moreover, a suit brought by an individual Member cannot properly be characterized as one filed on behalf of Congress, at least in the absence of some affirmative congressional action authorizing the Member to sue on its behalf. That is

particularly true where (as here) the individual Members have attacked the constitutionality of a federal statute rather than seeking to vindicate the legal and policy judgments of Congress as a whole.

Even if Members of Congress possessed a judicially cognizable interest in the proper administration of federal law, appellees' suit could not go forward at the present time. Until the President has actually exercised his cancellation authority with respect to a particular appropriations bill, the potential of the Act to frustrate appellees' own legislative preferences is too speculative to constitute injury in fact. And while the existing uncertainty concerning the Act's constitutional status may affect the manner in which legislative negotiations are conducted, the bare desire to eliminate legal uncertainty is an insufficient basis for invoking the jurisdiction of a federal court.

II. The Line Item Veto Act does not violate Article I. Its title notwithstanding, the Act does not authorize the President to sign into law some provisions of an appropriations bill while "returning" other provisions to Congress. The President remains subject to the constitutional obligation to approve or disapprove, in its entirety, an appropriations bill presented to him by Congress. His cancellation authority under the Act comes into existence only after an appropriations bill has been passed by both Houses of Congress and approved, *in toto*, by the President.

The effect of the Line Item Veto Act is to vest the President with authority to determine, in accordance with statutorily prescribed standards and procedures, whether items of spending that Congress has appropriated will in fact be spent. That grant of authority is fully consistent with historical practice. From the beginning of the Republic, Congress has frequently conferred upon the

President substantial discretion over the expenditure of appropriated funds. The First Congress, for example, chose to fund the general operations of the federal government through lump-sum appropriations acts that did not require that the full amount of the appropriation be spent. The settled historical practices of Congress and the Executive Branch regarding spending discretion strongly support the political Branches' shared judgment that the Line Item Veto Act is constitutional.

This Court has repeatedly recognized that Congress may vest the Executive Branch with considerable discretion in the administration of federal laws. The Line Item Veto Act places constitutionally sufficient limits on the President's exercise of discretion over federal spending. The President must cancel items "in whole" rather than in part and must devote any cancelled amounts to deficit reduction. The Act also provides significant guidance to the President in his decision whether particular items should be cancelled.

Finally, the Line Item Veto Act does not vest the President with the power to repeal any portion of an appropriations law. This Court has repeatedly upheld federal statutes authorizing the President to suspend their provisions, grant exemptions from their requirements, or otherwise modify their operation. Like the statutes previously upheld, the Line Item Veto Act permissibly vests the President with executive rather than legislative power. The fact that the President's cancellation of a particular item is irrevocable unless overturned by Congress does not alter the constitutional analysis. Indeed, that feature of the Act limits rather than expands the scope of the President's authority. The fact that the President's cancellation authority is conferred by the Line Item Veto Act rather than by individual appropriations laws also lacks constitutional significance.

ARGUMENT

I. APPELLEES LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE LINE ITEM VETO ACT

Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990).

> To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

Bennett v. *Spear*, No. 95-813 (Mar. 19, 1997), slip op. 6. "This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen* v. *Wright*, 468 U.S. 737, 754 (1984). Rather, Article III "requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' " *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979)), and that he "stand[s] to profit in some personal interest" by a judgment in his favor, *Allen*, 468 U.S. at 766 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 (1976)).

"[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen*, 468 U.S. at 750. The "require[ment] that the party seeking review be himself among the injured," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972)), ensures that the federal courts resolve disputed legal questions "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy," *Valley Forge*, 454 U.S. at 471 (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)). Article III's case-or-controversy requirement thus protects the separation of powers by ensuring that the Judicial Branch does not exercise a general superintendence over the workings of the federal government. See *Allen*, 468 U.S. at 760 (abandonment of standing requirements "would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action") (quoting *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972)); see also *Defenders of Wildlife*, 504 U.S. at 576 (role of federal courts is to determine "the rights of individuals").

The legal questions presented by the Line Item Veto Act—whether the Act violates Article I by enlarging the President's veto power under the Presentment Clause or by vesting the President with the power to repeal federal laws—are assuredly suitable for judicial resolution. If and when the President exercises his cancellation authority, moreover, his action is likely to result in judicially cognizable injury to persons who would otherwise be the recipients of the cancelled funds or tax benefits. See, *e.g.*, *Train* v. *City of New York*, 420 U.S. 35, 40 (1975).[10]

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[10] Suits by potential recipients of federal funds would not be brought against the named defendants in this case, however, but

Persons whose monetary interests are adversely affected by the Act's implementation will possess the prototypical "concrete stake" in the outcome of litigation, and will therefore satisfy the requirements of Article III.

Appellees, however, allege a very different sort of injury. The complaint in this case alleges that

> [t]he Act directly and concretely injures [appellees], in their official capacities, by (a) altering the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divesting [appellees] of their constitutional role in the repeal of legislation, and (c) altering the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress.

J.A. 12. Those asserted injuries do not satisfy the case-or-controversy requirement.

A. Members Of Congress Will Suffer No Judicially Cognizable Injury As A Result Of The Implementation Of The Line Item Veto Act

As we explain above, a private litigant can invoke the federal judicial power only by demonstrating a concrete personal stake in the outcome of the dispute. The United States and its agencies, by contrast, routinely initiate litigation (including criminal prosecutions), or appeal adverse rulings, in order to vindicate a more generalized governmental and public interest in the effective administration of federal law and to fulfill the President's responsibility under Article II to "take Care that the Laws be faithfully executed." This Court has explained:

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against the agency or agency official charged with the expenditure of the monies in question. See *Train*, 420 U.S. at 40.

> Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.

In re Debs, 158 U.S. 564, 584 (1895). See also, *e.g.*, *id.* at 584-586; *Coleman* v. *Miller*, 307 U.S. 433, 441-442 (1939); *SEC* v. *United States Realty & Improvement Co.*, 310 U.S. 434, 459-460 (1940); *INS* v. *Chadha*, 462 U.S. 919, 931 (1983); *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 132-133 (1995); cf. *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) ("[A] State has standing to defend the constitutionality of its statute."). Even where the named federal party is an individual government official, such a suit (or appeal) is properly regarded as one brought *on behalf of the government*, not as an effort to redress an injury done to the official in his individual capacity.[11]

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[11] In the context of suits brought *against* individual government officials, this Court has stressed the need for "careful adherence to the distinction between personal- and official-capacity suits." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985). "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of * * * law." *Ibid.* By contrast, official-capacity suits are in substance suits against the government, and seek relief (*e.g.*, the payment of public funds or the alteration of agency policy) against the government rather than the individual employee. See *id.* at 166; *Hafer* v. *Melo*, 502 U.S. 21, 25-26 (1991); *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963).

Thus, federal courts are authorized to adjudicate private actions brought by plaintiffs who establish a concrete personal interest in the outcome of the dispute, as well as suits brought by governmental entities to vindicate the public interest in the enforcement of the laws. Appellees, however, lack standing to sue under either theory.

1. This Court has

> consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

A similar distinction may be drawn between personal- and official-capacity suits (or appeals) brought *by* governmental actors. A federal officer or employee, whether or not authorized to conduct litigation on behalf of the United States, has standing to sue in federal court to vindicate such personal interests as an entitlement to federal pay or benefits. See, *e.g.*, *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986) (members of federal employees' union had standing to challenge the constitutionality of Gramm-Rudman-Hollings Act, based on showing that they would "sustain injury by not receiving a scheduled increase in benefits"); cf. *Powell* v. *McCormack*, 395 U.S. 486, 495-500 (1969) (suit concerning House of Representatives' refusal to seat elected Member was not moot where plaintiff retained claim for back salary). Where the alleged injury is the impairment of governmental functions, however, an official may invoke the jurisdiction of the federal courts only insofar as he is properly authorized to sue or appeal on behalf of the government. See *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 543-545 & n.6 (1986) (individual school board member lacked standing to appeal where board decided against appeal of adverse judgment); cf. *Karcher* v. *May*, 484 U.S. 72, 77-78 (1987) (individuals who intervened in their capacities as presiding officers of New Jersey Legislature could not appeal in their other individual and professional capacities after losing their positions as presiding officers).

Defenders of Wildlife, 504 U.S. at 573-574. While recognizing that, "[i]n some fashion, every provision of the Constitution was meant to serve the interests of all," this Court has emphatically rejected "[t]he proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 226-227 (1974).

A private plaintiff could establish the existence of a case or controversy by demonstrating that the cancellation of a particular budget item (or limited tax benefit) would adversely affect his own economic interests. See pages 19-20, *supra*. A member of the public could not, however, obtain judicial review of an exercise of the President's cancellation authority by alleging that the cancellation had negated the vote of his own Senator or Representative; that it had subverted the will of Congress; or that it had improperly shifted the balance of power between the Legislative and Executive Branches. Any such allegation would present a "generalized grievance" plainly insusceptible of judicial resolution. *United States* v. *Richardson*, 418 U.S. 166, 171 (1974).

Appellees' claim to standing thus rests on the premise that a Member of Congress has a judicially cognizable personal interest in the proper performance of his legislative duties, in the execution of an Act of Congress, or in the maintenance of the constitutionally prescribed balance of power between the President and Congress, even though his constituents possess no such interest. That premise is contrary to first principles of representative democracy. As then-Judge Scalia explained,

> no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable

> private interest. They wield those powers not as private citizens but only through the public office which they hold. Whatever the realities of private ambition and vainglory may be, in contemplation of law their personal interest in full and unfettered exercise of their authority is no greater than that of all the citizens for whose benefit (and not for the personal benefit of the officeholder) the authority has been conferred.

Moore v. *U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result), cert. denied, 469 U.S. 1106 (1985). Because Members of Congress exercise their powers as representatives and servants of the people—the "ultimate beneficiaries" (*Reservists*, 418 U.S. at 226-227) of the constitutional provisions on which appellees rely—the President's cancellation of budgetary items pursuant to the Line Item Veto Act would cause them no injury that is not shared by the public generally. See also *United States* v. *Munoz-Flores*, 495 U.S. 385, 394-395 (1990) (fundamental purpose of separation of powers is "to protect individual rights"); *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government * * * was to diffuse power the better to secure liberty.") (brackets and internal quotation marks omitted).[12] Cf. *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (association's

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[12] This analysis applies equally to suits brought by individual officials in the other Branches asserting impairment of their own governmental prerogatives. No one would suppose, for example, that a federal district judge would have standing to challenge statutory restrictions on the jurisdiction of the federal courts. The judge would also lack standing to petition for certiorari from a court of appeals decision reversing one of his rulings. Nor could the head of a Cabinet department assert standing to challenge an allegedly unlawful presidential directive regarding the exercise of his official duties.

standing to sue on behalf of its members requires, *inter alia*, that "its members would otherwise have standing to sue in their own right").

2. As we explain above (see pages 20-21 & note 11, *supra*), suits to vindicate generalized public interests may be brought by authorized federal officials acting "in their official capacities"—*i.e.*, on behalf of the government. For two reasons, however, appellees lack standing to sue on that basis.

a. Article II of the Constitution entrusts litigation on behalf of the United States to the Executive rather than the Legislative Branch. The "discretionary power to seek judicial relief" is "authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam) (quoting U.S. Const. Art. II, § 3). Because Congress "may not 'invest itself or its Members with either executive power or judicial power,'" *Metropolitan Washington Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (*MWAA*) (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928)), neither Congress nor its Members may initiate litigation designed to vindicate the general public and governmental interest in the proper administration of federal law. Cf. *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 800 n.10 (1987) (exercise of prosecutorial power by Congress would "eradicate fundamental separation-of-powers boundaries").[13]

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[13] The Court in *Chadha* stated that "Congress is the proper party to defend the validity of a [federal] statute when an agency of govern-

Separation-of-powers principles thus foreclose any contention that Congress suffers a judicially cognizable impairment of its lawmaking function if an Executive Branch official fails to give an enacted law its proper legal effect. Indeed, if Congress retained a judicially cognizable interest in the administration of laws that it had enacted, that interest would be equally threatened by private violations as by Executive Branch noncompliance. If Congress could define noncompliance with federal law as an injury to itself or its Members, it could usurp the President's constitutional responsibility for the execution of the laws.[14]

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ment, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is * * * unconstitutional." 462 U.S. at 940; see also *Arizonans for Official English* v. *Arizona*, 117 S. Ct. 1055, 1068 n.20 (1997); cf. *United States* v. *Lovett*, 328 U.S. 303, 304 (1946) (Congress appeared as amicus curiae after Solicitor General filed certiorari petition on behalf of the United States). In *Chadha*, however, the Immigration and Naturalization Service (INS)—while adhering throughout the litigation to the position that the challenged legislative veto provision was unconstitutional—had appealed from the court of appeals' decision invalidating that provision, and this Court held that the INS was a proper appellant. 462 U.S. at 929-931. In stating that Congress could appropriately appear in such circumstances to defend the constitutionality of the legislative veto provision, compare, *e.g.*, *Ornelas* v. *United States*, 116 S. Ct. 1657, 1661 n.4 (1996) (Court appointed private counsel to appear as amicus curiae in support of the court of appeals' judgment where neither the United States nor the private petitioner espoused the court of appeals' legal theory); *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 210 n.9 (1968) (same); *Lovett*, 328 U.S. at 304, the Court did not suggest that Congress would have had authority to appeal from the court of appeals' decision if the responsible Executive Branch officials had declined to do so. Cf. *Young*, 481 U.S. at 817 (Scalia, J., concurring in judgment) ("Even complete failure by the Executive to prosecute law violators, or by the courts to convict them, has never been thought to authorize congressional prosecution and trial.").

[14] Different considerations may be presented if Congress (or one House thereof) seeks judicial redress in aid of its legislative func-

b. Even if the Line Item Veto Act could be said to impair a distinct institutional interest of Congress itself, separate and apart from the generalized public interest in Executive Branch compliance with the Constitution and laws, appellees would lack standing to sue. A suit brought by an individual Member cannot properly be characterized as one filed on behalf of Congress, at least in the absence of some affirmative congressional action authorizing the Member to sue on its behalf. The federal legislative "[p]ower is not vested in any one individual, but in the aggregate of the members who compose the body, and [Congress's] action is not the action of any separate member or number of members, but the action of the body as a whole." *United States* v. *Ballin*, 144 U.S. 1, 7 (1892). Cf. *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534,

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tions. See, *e.g.*, 2 U.S.C. 288b(b) (Senate Legal Counsel "shall bring a civil action to enforce a subpena of the Senate or a committee or subcommittee of the Senate * * * when directed to do so by the adoption of a resolution by the Senate"); cf. *McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."); *Buckley*, 424 U.S. at 137-138.

The cancellation authority conferred on the President by the Line Item Veto Act, however, effects no interference with Congress's performance of its lawmaking functions. The Act deals only with the manner in which appropriations bills will be implemented *after* they have been enacted into law. That would be true, moreover, even if appellees and the district court were correct in characterizing the President's exercise of cancellation authority under the Act as the power to "repeal" portions of appropriations laws. A purported presidential repeal of an enacted law would prevent the law from being faithfully executed, but it would not prevent Congress from performing its own responsibilities. Because Congress has no constitutional role in the execution of enacted laws, see *Bowsher*, 478 U.S. at 733 ("once Congress makes its choice in enacting legislation, its participation ends"), it has no judicially cognizable interest in the Line Item Veto Act's constitutional status. Cf. *Buckley*, 424 U.S. at 139-140.

544 (1986) (appellant's status as member of school board "does not permit him to 'step into the shoes of the Board' and invoke its right to appeal"; "[g]enerally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take").

An Executive Branch official could not sue to vindicate the institutional interests of the agency at which he worked absent some showing of authority to litigate on its behalf. Cf. *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 92-99 (1994). Nor could such an official evade the limitations on his governmental litigating authority by suing in his own name and recasting the alleged impairment of agency functions as a personal injury to himself. The same principles apply here.

Appellees' lack of standing is particularly clear in the instant case. Although appellees allege that the Line Item Veto Act "alter[s] the constitutional balance of powers between the Legislative and Executive Branches," J.A. 12, they do not seek to vindicate the legal or policy judgments of Congress as a whole. To the contrary, their suit involves a constitutional challenge to a law that was enacted by Congress and that has been defended in the district court and this Court by the Senate and House of Representatives as *amici curiae*. Under those circumstances, appellees cannot plausibly claim to have standing to represent the interests of the Legislative Branch.[15]

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[15] *Coleman* v. *Miller*, *supra*, is not to the contrary. In *Coleman*, 21 (out of 40) state senators brought a mandamus action in the Kansas Supreme Court. 307 U.S. at 436. The gravamen of their suit was that the State's Lieutenant Governor, as presiding officer of the Senate, had improperly cast a tie-breaking vote in support of ratification of a proposed amendment to the United States Constitution. *Id.* at 435-436. The state supreme court entertained the suit on the merits, concluded that the Lieutenant Governor was authorized to cast the deciding vote, and held on that basis that the proposed amendment had been properly

ratified by the Kansas Legislature. *Id.* at 437. The plaintiffs then sought review in this Court, which held that "at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision." *Id.* at 446. Four Members of the Court would have held that the plaintiffs lacked standing. See *id.* at 460 (opinion of Frankfurter, J.).

Coleman is distinguishable from the instant case in three significant respects. First, the Court did not address the standing of federal legislators, nor did it hold that the plaintiffs would have had standing to bring their suit in federal court; it simply held that it had jurisdiction to review the state supreme court's decision where the plaintiffs' "interest in maintaining the effectiveness of their votes" had been "treated by the state court as a basis for entertaining and deciding the federal questions." 307 U.S. at 438, 446. Because the separation-of-powers principles applicable to the federal government are not binding upon the States, see, *e.g.*, *Karcher*, 484 U.S. at 82 (New Jersey Legislature was properly authorized under state law to represent the State's interest in litigation), *Coleman* is not controlling here. See *Moore*, 733 F.2d at 959 n.1 (Scalia, J., concurring in result). Second, the votes of the *Coleman* plaintiffs had legal significance as a bloc, since those votes "would have been sufficient to defeat the resolution" under the plaintiffs' view of the Constitution. 307 U.S. at 446. The *Coleman* plaintiffs therefore might plausibly have been regarded as acting on behalf of the legislature, and their entitlement to do so was a matter of state rather than federal law. Finally, *Coleman* involved an asserted impropriety in the process by which votes were counted within the state legislature, rather than a defect in the administration of a duly enacted law. In the federal sphere, the separation of powers among the Branches and the autonomy of the Senate and House of Representatives on internal matters such as voting (see U.S. Const. Art. I, § 5) preclude recognition of a comparable judicially cognizable interest on the part of individual Members of Congress.

B. Because The President Has Not Yet Exercised His Cancellation Authority Under The Line Item Veto Act, Appellees Can Identify No Actual Or Imminent Injury

Even if Members of Congress possessed a judicially cognizable interest in the proper administration of federal law, appellees' suit could not go forward. This Court has emphasized that "[a]llegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact." *Whitmore*, 495 U.S. at 158 (internal quotation marks omitted); accord, *e.g.*, *Defenders of Wildlife*, 504 U.S. at 564 & n.2.[16] Appellees acknowledge (Resp. to J.S. 4) that the President has not yet exercised the cancellation authority conferred by the Line Item Veto Act. Rather, the gravamen of their suit is that the President will, in the future, employ that authority so as to frustrate the proper implementation of appropriations bills enacted by Congress. That claim is too speculative to provide a basis for federal jurisdiction.

The Line Item Veto Act, taken alone, has no legal effect on appellees or on any private actor. Nor does the Act restrict Congress's authority in fashioning future appropriations measures. Congress retains the power to provide that the Act shall not apply to a particular appropriations law. Congress may also provide that the President's cancellation authority does not apply to an

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[16] The requirement that a plaintiff's injury be "actual or imminent, not 'conjectural' or 'hypothetical,'" *Whitmore*, 495 U.S. at 155 (quoting *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983)), is closely related to the requirement that the claim be "ripe" for adjudication. Cf. *Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) (noting that "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction").

individual line item in an appropriations law that is otherwise subject to the Act. Conversely, Congress may vest the President with *broader* discretion in the administration of a particular appropriations bill—*e.g.*, by authorizing him to cancel budgetary items in part rather than in whole, or by permitting him to cancel items after the expiration of the initial five-day period. The Act simply establishes a "default rule," cf. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 272 (1994): it defines the extent of the President's discretion in the administration of appropriations measures in the absence of an express contrary provision contained in a particular law.

Thus, even the *legal* effect of the Line Item Veto Act cannot accurately be assessed until a particular appropriations bill becomes a law. Only then can the scope of the President's discretion in administering that law be compared to the discretion that he would possess if the Line Item Veto Act were not on the books. The Act's *practical* consequences, moreover, cannot be determined until the President has exercised his cancellation authority. At the present time, it remains unclear when the President will invoke the cancellation authority contained in the Line Item Veto Act; what items of spending, or limited tax benefits, he will choose to cancel; and whether those items will be made effective again through a disapproval bill. It is, in particular, unclear when or whether legislative measures supported by appellees themselves will be cancelled pursuant to the Act's procedures. Thus, even if a Member of Congress could be said to suffer a judicially cognizable injury through the frustration of his own legislative preferences, no such injury is either present or imminent in the instant case.

In explaining its contrary conclusion, the district court stated that, "[b]ecause [appellees] now find themselves in a position of unanticipated and unwelcome subservience to

the President before and after they vote on appropriations bills, Article III is satisfied." J.S. App. 14a; see also *id.* at 12a ("Under the Act the dynamic of lawmaking is fundamentally altered. Compromises and trade-offs by individual lawmakers must take into account the President's item-by-item cancellation power looming over the end product."). Appellees are free, however, to vote and to participate in legislative negotiations on the basis of their own stated conviction that the Act is unconstitutional and that any exercise of the President's cancellation authority will therefore be a legal nullity. No alteration in "the dynamic of lawmaking" is compelled by the Line Item Veto Act. Rather, any such change will result from the fact that other participants in the legislative process do not share appellees' view that the Act is constitutionally deficient. See *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 42 ("case or controversy" requirement is not satisfied where plaintiff's injury "results from the independent action of some third party not before the court").[17]

Legislative deliberations frequently take place against a backdrop of substantial disagreement or uncertainty

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[17] The district court's reliance (see J.S. App. 13a) on *MWAA* was misplaced. Plaintiffs in *MWAA* asserted that the power of the MWAA's Board of Review to veto actions of the MWAA's Board of Directors was unconstitutional because the Board of Review was composed of Members of Congress, in violation of separation-of-powers principles. See 501 U.S. at 259, 262. Plaintiffs filed suit, however, *after* the Airports Authority had adopted a "master plan" for the construction of a new terminal at National Airport. See *id.* at 261-262. Plaintiffs "alleged that the master plan allows increased air traffic at National [Airport] and a consequent increase in accident risks, noise, and pollution." *Id.* at 264. Although the Court held that the plaintiffs were not required to await an actual exercise of the Board of Review's veto power before filing suit, see *id.* at 265 n.13, it did not suggest that the existence of the veto power was sufficient, standing alone, to constitute an injury in fact.

regarding the existing state of the law. Neither the President nor Congress (or its individual Members) could unilaterally obtain an advisory opinion from this Court or a lower federal court regarding the constitutionality of the Line Item Veto Act, even if the request for such an opinion was motivated by a desire to eliminate legal uncertainty about the manner in which they should exercise their respective powers and responsibilities. See Correspondence of the Justices, *reprinted in* 3 *The Correspondence and Public Papers of John Jay* 486-489 (H. Johnston ed. 1891); *Muskrat* v. *United States*, 219 U.S. 346, 354 (1911); *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446 (1993). That issue is no more suitable for judicial resolution in its present posture merely because several individual Members of Congress have written their request in the form of a complaint and named as defendants two officers of the other political Branch who happen to hold a contrary view of the constitutional question.

II. THE LINE ITEM VETO ACT DOES NOT VIOLATE ARTICLE I OF THE CONSTITUTION

A. The Act Does Not Conflict With The Constitutional Requirement That The President Approve Or Disapprove *In Toto* A Bill Presented To Him By Congress

The Presentment Clause requires that "[e]very Bill" passed by Congress "shall, before it become a Law, be presented to the President." Art. I, § 7, Cl. 2.[18] When a bill

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[18] Article I actually has two Presentment Clauses: Article I, Section 7, Clause 2, which applies to "Bill[s]," and Article I, Section 7, Clause 3, which applies to all "Order[s], Resolution[s], or Vote[s] to which the Concurrence of the Senate and House of Representatives may be necessary." Clause 3 was adopted to prevent evasion of the presentment requirement "by the simple expedient of calling a proposed law a 'resolution' or 'vote' rather than a 'bill.'" *Chadha*, 462 U.S.

is presented to the President, the Presentment Clause gives him two options: if he "approve[s]" the bill, "he shall sign it," and if he does not approve the bill, "he shall return it, with his Objections to that House in which it shall have originated." *Ibid.*[19] If the President signs the bill, it becomes a law. If the President instead returns the bill, it does not become law unless two-thirds of each House vote to override the President's veto. As the district court correctly recognized, see J.S. App. 5a-6a & n.3, 18a-19a, the President is required to sign or return, *in toto*, a bill presented to him by Congress; he is not empowered to sign some portions of the bill and return others.

The Line Item Veto Act is consistent with that requirement. Its title notwithstanding, the Act does not authorize the President to sign into law some provisions of an appropriations bill while "returning" other provisions to Congress.[20] When a spending bill is presented to the President, he must "sign" or "return" it *in toto*. By its terms, the Act applies only to "bill[s] or joint resolution[s] that ha[ve] been signed into law pursuant to Article I, section 7, of the Constitution of the United States." ICA

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at 947. For the sake of simplicity, we refer exclusively to Clause 2 in the text, but the discussion applies equally to both Presentment Clauses.

[19] If the President neither signs the bill nor returns it within ten days, the bill "shall be a Law, in like Manner as if he had signed it," unless Congress has by its adjournment prevented the bill's return, in which case the bill "shall not be a Law." Art. I, § 7, Cl. 2; see generally *The Pocket Veto Case*, 279 U.S. 655 (1929).

[20] Although the word "veto" is commonly used to describe the President's power to "return" a disapproved bill to the House of Congress in which it originated, see *Chadha*, 462 U.S. at 925, the word "veto" does not appear in the Presentment Clause, or anywhere else in the Constitution. The presence of the term in the title of the Act has the same constitutional significance as the absence of the term from the Presentment Clause—none.

§ 1021(a) (2 U.S.C. 691(a)); J.S. App. 32a. When the President signs a bill, "[the] bill when so signed becomes from that moment a law." *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 454 (1899); *United States* v. *Will*, 449 U.S. 200, 224-225 & n.29 (1980) (President's signature marks "the precise time the statute became law").

Thus, the President's cancellation authority under the Act comes into existence only *after* the requirements of the Presentment Clause have been satisfied. See H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 20 (1996) ("[T]he cancellation authority only becomes effective after the President has exercised the constitutional authority to enact legislation in its entirety."). The district court therefore correctly held that "statutes subject to cancellation will have been 'approved' [by the President] in accordance with the Presentment Clause." J.S. App. 20a.[21] Because the cancellation authority created by the Act does not prevent any portion of an appropriations bill from becoming law, it is fully consistent with the constitutional requirement that the President sign or return a presented bill *in toto*.[22]

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[21] A bill returned to Congress can be enacted into law if, but only if, it is subsequently approved by two-thirds of each House. U.S. Const. Art. I, § 7, Cl. 2. A presidential cancellation pursuant to the Line Item Veto Act, by contrast, can be overturned by new legislation passed by a simple majority of each House, see ICA § 1026(6) (2 U.S.C. 691e(6)); J.S. App. 49a-50a, subject to a possible presidential veto and subsequent override. That is the method that Congress is required to employ whenever it disapproves of the manner in which the Executive Branch has exercised discretionary authority conferred by statute. See *Chadha*, 462 U.S. at 954-955, 958.

[22] The requirement that the President must exercise his cancellation authority, if at all, within five days after the bill has become law is a proper mechanism by which Congress has limited the authority otherwise conferred by the Act upon the President to control spending. A prompt decision is necessary to avoid the potential disruption of

The cancellation authority vested in the President by the Line Item Veto Act may be similar, in practical effect, to the power that he would possess under a hypothetical statute conferring true item veto (*i.e.*, partial "return") authority.[23] That similarity does not, however, cast doubt upon the Act's constitutional status. The requirements imposed by the Presentment Clause—while designed to protect substantive values, see *Chadha*, 462 U.S. at 958 n.23 ("The legislative steps outlined in Art. I are not empty formalities.")—are procedural in nature. So long as

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federal spending programs that could arise from belated cancellations. It is hardly unprecedented for federal laws to require the Executive Branch to make determinations and exercise discretionary authority within a strictly limited period of time. For example, the Shipping Act of 1984 gives the President the power to suspend certain rate orders of the Federal Maritime Commission if he determines that a suspension is required "for reasons of national defense or foreign policy," but he must act within ten days after the receipt or effective date of the Commission order. 46 U.S.C. App. 1708(e). Similarly, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 authorized the Attorney General temporarily to employ specified transitional rules for the detention and release of criminal aliens, but only if she notified Congress within ten days of the enactment of the Act. Pub. L. No. 104-208, Div. C, § 303(b)(2), 110 Stat. 3009-586.

[23] The President's powers under the Act are markedly less sweeping, however, than those he would possess if the *Constitution* authorized him to "return" some portions of an appropriations bill while signing other portions into law. The Act expires by its terms on January 1, 2005, see Pub. L. No. 104-130, § 5, 110 Stat. 1212 (J.S. App. 59a), and it is subject to amendment or repeal at any time. Moreover, Congress retains the power to exempt particular appropriations bills (or individual items contained therein) from the coverage of the Act, see pages 30-31, *supra*, and thus retains ultimate control of the manner in which the Act is applied to an individual appropriations law. The Act also identifies certain findings that the President must make, and additional factors that he must consider, before exercising his cancellation authority. See pages 10-11, *supra*; pages 44-45, *infra*.

future appropriations laws are enacted in conformance with those procedural requirements, the Presentment Clause is satisfied.

Because the Line Item Veto Act governs the implementation of appropriations statutes *after* they have become law, rather than the process by which they are enacted, the Act presents no genuine Presentment Clause issue. Rather, the Act must be scrutinized under the standards governing statutory grants of discretion to the Executive Branch in its administration of duly enacted laws. The Act operates to make the specified spending and revenue items discretionary, rather than mandatory, where the President finds that the Act's criteria have been met.[24] The Act thus vests the President with authority to determine, in accordance with statutorily prescribed standards and procedures, whether items of spending that Congress has authorized will in fact be spent. As we explain below, that grant of authority is fully consistent both with historical practice and with this Court's precedents.

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[24] In discussing the effect of the Act on future spending bills, we use the terms "discretionary" and "mandatory" to distinguish between spending authority that the Executive Branch has discretion not to exercise and spending authority that the Executive Branch is legally obligated to exercise. Those terms are often used in a different sense in the federal budget process: "discretionary" spending signifies "programs that are subject to annual funding decisions in the appropriations process," while "mandatory" spending (also known as "direct" spending) means "all spending that is made pursuant to laws other than appropriations laws." Senate Comm. on the Budget, 104th Cong., 2d Sess., *The Congressional Budget Process: An Explanation* 5, 6 (Comm. Print 1996).

B. The Act Is Consistent With The Historical Understanding Of Congress's Power To Confer Spending Discretion On The Executive Branch

"Long settled and established practice is a consideration of great weight" in the adjudication of constitutional questions. *The Pocket Veto Case*, 279 U.S. 655, 689 (1929); see also *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) ("'traditional ways of conducting government * * * give meaning' to the Constitution") (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)). As we explain above, the conferral upon the President of substantial discretion over the expenditure of appropriated funds has been a recurring practice of Congress under the Spending Clause from the beginning of the Republic. See pages 2-6, *supra*; *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322 (1937) ("Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies.").

Congress has sometimes conferred that discretion in individual appropriations acts. At other times, Congress has given the President broad authority to withhold appropriated funds on a government-wide basis in order to pursue overarching budgetary goals of Congress's choosing. See pages 2-6, *supra*. When Congress has given the President discretion over appropriated funds, it often has chosen not to impose binding restrictions on how that discretion is to be exercised. Thus, when Congress has passed lump-sum appropriations bills, see *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993), or when it has given the President general authority to reduce government spending below appropriated levels, see pages 5-6, *supra*, the President has been left largely free to exercise his own judgment

regarding which spending programs to reduce and how much to reduce them. The degree of authority vested in the President has varied from time to time, in response to changing legislative judgments about the need for Executive Branch discretion. The extent of the Executive Branch's spending discretion in any particular instance has always been regarded, however, both by Congress and by the courts, as a matter for Congress itself to decide through the legislative process.

The practices of the First Congress regarding Executive Branch spending discretion are particularly instructive. The acts of the First Congress "provide[] 'contemporaneous and weighty evidence' of the Constitution's meaning since many of the Members of the First Congress 'had taken part in framing that instrument.'" *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986) (quoting *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983)). As we explain above (see pages 2-3, *supra*), the First Congress chose to fund the general operations of the federal government through lump-sum appropriations acts that did not require the Executive Branch to spend the full amount of the appropriations. See, *e.g.*, Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95 (appropriating "a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war").[25] The Members of the First Congress evidently saw no constitutional

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[25] The lump-sum appropriations passed by the First Congress did not vest the President with unlimited discretion over the use of the appropriated sums. Other statutes, such as those fixing the salaries of federal officers, required the expenditure of a portion of the appropriations. See, *e.g.*, Act of Sept. 11, 1789, ch. 13, §§ 1-2, 1 Stat. 67-68 (salaries of executive officers). Nevertheless, Congress left the President free to decide how (and whether) to spend the remainder of the appropriated funds.

impediment to vesting the Executive Branch with broad discretion over the disposition of appropriated funds.

Viewed against this historical background, the Line Item Veto Act can hardly be characterized as "revolutionary." J.S. App. 25a. Like its many statutory predecessors, the Act simply gives the President a measure of discretion over the expenditure of appropriated funds, discretion that may be exercised only in accordance with the procedural and substantive limitations imposed by Congress. In sum, the settled historical practices of Congress and the Executive Branch regarding spending discretion add "great weight," *The Pocket Veto Case*, 279 U.S. at 689, to the political Branches' shared judgment that the Line Item Veto Act satisfies the requirements of Article I.

C. The Act Does Not Delegate Legislative Power To The President

The district court held that the Act violates the Presentment Clause by vesting the President with legislative power—specifically, the power to repeal laws. See J.S. App. 24a-26a. That holding is incorrect. When the President employs the cancellation authority conferred by the Act, he is not exercising legislative power, but is carrying out his core Article II function of "faithfully execut[ing]" the laws.

1. The requirements of the Presentment Clause do not apply to the President's administration of enacted laws. As the Court explained in *Chadha*, "[e]xecutive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require." 462 U.S. at 953 n.16. The lawmaking procedures required by the Presentment Clause are "not necessary as a check on the Executive's administration of the laws

because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7." *Ibid.*

When the President acts, "he presumptively acts in an executive or administrative capacity as defined in Art. II." *Chadha*, 462 U.S. at 951. The Article II character of the President's actions does not change when, as here, the President is exercising discretionary authority in the implementation of federal laws. While Article I vests "[a]ll legislative Powers" in Congress (Art. I, § 1), it "do[es] not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta*, 488 U.S. at 372. Instead, Congress is free to "leav[e] a certain degree of discretion to executive * * * actors" in the execution of federal laws. *Touby* v. *United States*, 500 U.S. 160, 165 (1991). Accordingly, this Court has long recognized that "no valid objection can be made" to "conferring authority or discretion [on the President] as to * * * execution [of a federal law], to be exercised under and in pursuance of the law." *Field* v. *Clark*, 143 U.S. 649, 693-694 (1892) (internal quotation marks omitted).

Although Congress may vest the Executive Branch with considerable discretion in the administration of federal laws, it may not—either expressly or in practical effect—delegate to other Branches the "lawmaking function" vested in it by Article I. See, *e.g.*, *Loving* v. *United States*, 116 S. Ct. 1737, 1744 (1996) ("[T]he lawmaking function belongs to Congress * * * and may not be conveyed to another branch."); *id.* at 1752 (Scalia, J., concurring in part and concurring in the judgment) ("Legislative power is nondelegable."); *Touby*, 500 U.S. at 165. Where Congress is alleged to have impermissibly delegated its legislative powers to other officials, "[t]he focus of controversy * * * has been whether the *degree* of generality contained in the authorization for exercise of executive or judicial

powers in a particular field is so unacceptably high as to *amount to* a delegation of legislative powers." *Mistretta*, 488 U.S. at 419 (Scalia, J., dissenting). The nondelegation doctrine thus protects the separation of powers by ensuring that the President's executive authority is not so broad and unconstrained as to amount to the exercise of legislative power.

In applying the nondelegation doctrine, this Court "has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority.'" *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). The touchstone of analysis is whether Congress has provided an "intelligible principle" for the exercise of executive discretion. *Mistretta*, 488 U.S. at 372; *J.W. Hampton*, 276 U.S. at 406. Applying the "intelligible principle" standard, the Court has repeatedly sustained the constitutionality of laws that vest the Executive Branch with discretion over the implementation of federal statutes and programs.[25] The Court has approved grants of discretionary authority "under [statutory] standards phrased in sweeping terms," *Loving*, 116 S. Ct. at 1750, sustaining the constitutionality of laws giving the Executive Branch the authority to regulate broadcast licensing as required

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[25] See, *e.g.*, *Loving*, *supra*; *Touby*, *supra*; *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Mistretta*, *supra*; *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *Lichter* v. *United States*, 334 U.S. 742, 785 (1948); *American Power & Light Co.*, *supra*; *Yakus* v. *United States*, 321 U.S. 414 (1944); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *NBC* v. *United States*, 319 U.S. 190 (1943); *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24 (1932); *J.W. Hampton*, *supra*; *Field*, *supra*; *Synar* v. *United States*, 626 F. Supp. 1374, 1383-1384 & n.9 (D.D.C.) (per curiam) (three-judge court) (citing cases), aff'd *sub nom. Bowsher* v. *Synar*, 478 U.S. 714 (1986).

by "public interest, convenience, or necessity," *NBC* v. *United States*, 319 U.S. 190, 194, 225-226 (1943); to approve consolidation of carriers "in the public interest," *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24 (1932); to recover "excessive profits" on military contracts, *Lichter* v. *United States*, 334 U.S. 742, 778-786 (1948); to fix prices that "will be generally fair and equitable and will effectuate the purposes" of the law, *Yakus* v. *United States*, 321 U.S. 414, 420, 426-427 (1944); and to determine "just and reasonable" natural gas rates, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600-601 (1944).

2. It is far from clear that congressional appropriations of money are subject to the "intelligible principle" standard that generally applies to regulation of private conduct. This Court has observed that "certain categories of administrative decisions * * * traditionally have [been] regarded as 'committed to agency discretion.'" *Lincoln*, 508 U.S. at 191. "The allocation of funds from a lump-sum appropriation is" one such decision, since "a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions." *Id.* at 192 (internal quotation marks omitted). Lump-sum appropriations have been used throughout the Nation's history, and their constitutionality "has never been seriously questioned." *Cincinnati Soap Co.*, 301 U.S. at 322. So long as the activities on which appropriated funds are spent are themselves authorized by statute, and so long as the Executive Branch adheres to the constitutional directive that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," Art. I, § 9, Cl. 7; see *OPM* v. *Richmond*, 496 U.S. 414, 424-425 (1990), we believe that no constitutional infirmity would exist even if

ar: appropriations statute placed no further constraints on Executive Branch discretion. Even if the "intelligible principle" standard articulated in *Mistretta* is assumed to apply in this context, however, the Line Item Veto Act places constitutionally sufficient constraints on the President's exercise of discretion over federal spending.

a. To begin with, the Act permits the President to cancel items only "in whole," ICA § 1021(a) (2 U.S.C. 691(a)); J.S. App. 32a, not in part, thereby requiring him to make "an all or nothing decision." H.R. Conf. Rep. No. 491, *supra*, at 33. And because the Act's "lockbox" feature (see page 10 & note 6, *supra*) requires that any cancelled amounts be devoted to deficit reduction, there is no authority to divert cancelled funds for other purposes. The Act's requirement that each budgetary item must be devoted either to a congressionally defined purpose or to deficit reduction is itself a substantial limitation on the President's discretion.

b. In addition, the Act provides significant guidance to the President in his choice between those two alternatives. The Act permits the President to cancel particular spending and revenue items only if he determines that cancellation will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." ICA § 1021(a)(A) (2 U.S.C. 691(a)(A)); J.S. App. 33a. The Act thereby "establishes clear preconditions to Presidential action," *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976), using criteria that are at least as "intelligible" as those previously approved by this Court. See pages 42-43 & note 26, *supra*.

The Act also requires the President to consider "the legislative history, construction, and purposes of the law which contains" the cancelled items as well as "any specific sources of information referenced in such law"; to provide his estimate of the "fiscal, economic, and budget-

ary effect" of the cancellation; to estimate the "effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided"; and to set forth the geographic distribution of the cancelled spending. ICA §§ 1021(b), 1022(b) (2 U.S.C. 691(b), 691a(b)); J.S. App. 33a-35a. By directing the President to consider those additional matters, Congress has offered further guidance as to the factors that should inform his decision. The requirement that the President articulate his assessment of the pertinent criteria provides an additional safeguard against arbitrary action. Cf. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Finally, the Act places a substantial portion of the federal budget outside the scope of the President's cancellation authority altogether, by excluding spending for entitlement programs and other "direct spending" that results from previously enacted laws. ICA § 1026(8) (2 U.S.C. 691e(8)); J.S. App. 51a ("item of new direct spending" defined as "any specific provision of law that is estimated to result in an *increase* in budget authority or outlays for direct spending" over the budgetary "baseline") (emphasis added); see note 4, *supra*. Because "Congress [has] clearly delineate[d] the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority," *Mistretta*, 488 U.S. at 372-373 (internal quotation marks omitted), the exercise of cancellation authority under the Act represents the Article II power to execute the laws of the United States, not the legislative power vested in Congress by Article I.[27]

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[27] The district court sought to distinguish the Line Item Veto Act from statutes previously upheld by this Court under the nondelegation doctrine on the ground that the Act "hands off to the President authority over fundamental legislative choices" and "spares Congress the burden of making those vexing choices of which programs to preserve and which to cut." J.S. App. 27a. The precise import of those state-

3. It is, of course, undisputed that "[a]mendment and repeal of statutes, no less than enactment, must conform with [the lawmaking requirements of] Art. I." *Chadha*, 462 U.S. at 954. The Line Item Veto Act, however, does not authorize the President to repeal legislation. Instead, by making individual items in spending legislation permissive rather than mandatory (see page 37, *supra*), it simply gives the President discretionary authority over the implementation of future appropriations acts. This Court's precedents make clear that this kind of power, exercised pursuant to statutory authorization, is not tantamount to legislative repeal under Article I.

a. In *Field*, importers challenged the constitutionality of a section of the Tariff Act of 1890 that authorized the President to "suspend" the Act's provisions (thereby raising tariffs) if the President determined that foreign governments were imposing "reciprocally unequal and unreasonable" tariffs on specified commodities. Act of Oct. 1, 1890, ch. 1244, § 3, 26 Stat. 612. The importers argued that the suspension provision unconstitutionally delegated lawmaking power to the President. 143 U.S. at 681. The Court rejected that contention, holding that "[t]he true [constitutional] distinction * * * is between the delegation of power to make the law * * * and

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ments is unclear. If the court meant that the fashioning of budgetary priorities is an inherently legislative (and thus nondelegable) function, the court's analysis cannot be squared with Congress's consistent (and heretofore unquestioned) practice of authorizing the Executive Branch to exercise considerable discretion over the expenditure of appropriated funds. Contrary to the district court's apparent belief (see *id.* at 27a-28a), it is neither unprecedented nor unconstitutional for Congress to give the President discretion over "which programs to preserve and which to cut." If the district court meant that the discretion conferred by the Line Item Veto Act is standardless or otherwise unduly broad, it was incorrect for the reasons stated at pages 44-45, *supra*.

conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." *Id.* at 693-694 (internal quotation marks omitted).

The Court has also sustained the related congressional practice of vesting the Executive Branch with discretionary authority to create exemptions from federal laws or otherwise limit their scope. For example, the former Interstate Commerce Act, while generally prohibiting carriers from offering long-haul discounts, "gave an authority to the Interstate Commerce Commission * * * to grant relief from this prohibition," authority that was "undefined except as the general purposes of that Act implied the basis for affording exemption." *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944). In the *Intermountain Rate Cases*, 234 U.S. 476, 486-489 (1914), the Court squarely rejected a claim that Congress had conveyed Article I legislative power to the Executive Branch by authorizing the Commission to create exemptions from the long-haul discount prohibition.

A wide variety of federal laws currently authorize the Executive Branch to suspend their provisions, grant exemptions from their requirements, or otherwise modify their operation.[28] When the Executive Branch suspends

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[28] See, *e.g.*, *Touby*, 500 U.S. at 162 (upholding statutory provision that authorizes Attorney General to remove substances from, as well as add substances to, statutory schedules of Controlled Substances Act); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 306(c), 110 Stat. 821-822 (to be codified at 22 U.S.C. 6085(c)) (authorizing President to suspend provision of Helms-Burton Act exposing foreign firms to civil liability for use of confiscated American property in Cuba); 5 U.S.C. 5303(b)(1), 5304a(a) (authorizing President to replace statutory formula for federal employee pay increases with formula chosen by President); 10 U.S.C. 7309(b) (authorizing President to make exceptions to ban on foreign construction of military vessels); 15 U.S.C. 78*l*(h) (authorizing SEC to "exempt in whole or in part any issuer or class of issuers" from

the operation of statutory provisions (as in *Field*) or otherwise modifies the operation of the statute (as in the *Intermountain Rate Cases*) pursuant to authority conveyed in the statute itself, no Presentment Clause problem arises: the President is simply exercising his Article II power to "faithfully execute" the law according to its terms. See *Field*, 143 U.S. at 693 (President's suspensory power "was a part of the law itself as it left the hands of Congress"). As noted above, the lawmaking procedures of the Presentment Clause are "not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7." *Chadha*, 462 U.S. at 953 n.16.

b. The district court found it significant (see J.S. App. 25a) that cancellation under the Act "rescind[s]" discretionary budget authority and renders items of new direct spending and limited tax benefits without "legal force or effect." ICA § 1026(4)(A)-(C) (2 U.S.C. 691e(4)(A)-(C)); J.S. App. 48a-49a. Contrary to the district court's suggestion, Congress's use of that terminology does not transform the President's cancellation authority into a power of statutory repeal. Indeed, this Court has previously discussed with approval statutory provisions phrased in similar terms. In *Field*, for example, this Court cited the example of a customs statute providing that specified tariff acts "shall be repealed" if the President declared that discriminatory foreign tariffs had been abolished. See 143 U.S. at 687 (citing Act of May 31, 1830, ch. 219, § 2, 4 Stat. 425). *Field* also cited an import statute authorizing the

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specified provisions of Securities Exchange Act of 1934); 47 U.S.C. 227(b)(2) (authorizing FCC to establish exemptions from federal ban on pre-recorded telemarketing calls).

President to "declare the provisions of this act to be inoperative, and the same shall be afterwards inoperative and of no effect from and after thirty days from the date of said proclamation." *Id.* at 688 (citing Act of Mar. 6, 1866, ch. 12, § 2, 14 Stat. 4). Far from regarding those statutes as constitutionally deficient, the Court cited them as historical support for the constitutionality of the tariff act at issue in *Field*. See also 28 U.S.C. 2072(b) ("All laws in conflict with" rules of practice and procedure promulgated by this Court "shall be of no further force or effect after such rules have taken effect."); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10 (1941); *Henderson* v. *United States*, 116 S. Ct. 1638, 1644 (1996); *Synar* v. *United States*, 626 F. Supp. 1374, 1387 (D.D.C. 1986), aff'd on other grounds *sub nom. Bowsher* v. *Synar*, *supra*.

c. Nor does any constitutional infirmity result from the fact that the President's cancellation of a particular item is irrevocable unless overturned by a subsequent disapproval bill.[29] There is, in particular, no basis for the district court's suggestion that this feature of the Line Item Veto Act effects a particularly "expansive * * * delegation[] of power." J.S. App. 25a. To the contrary, the discretion thus conferred is plainly *narrower* than would be the case if the President were authorized to revisit the question whether particular expenditures should be made.

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[29] Thus, while the decision whether to undertake a criminal prosecution "has long been regarded as the special province of the Executive Branch," *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985), prosecutorial officials may by their actions effectively preclude themselves from proceeding in a particular case—*e.g.*, by entering into a plea agreement, cf. *Santobello* v. *New York*, 404 U.S. 257 (1971), or by failing to obtain an indictment within the statutory limitations period. See also note 22, *supra* (examples of laws requiring that Executive Branch discretion be exercised, if at all, within a narrow period of time).

d. If a particular appropriations law explicitly gave the President the choice whether to spend or to impound specified sums of money, it could hardly be contended that the President's impoundment of funds effected a repeal of the law or subverted the will of Congress. The fact that the President's cancellation authority is conferred by the Line Item Veto Act rather than by individual appropriations laws does not alter the constitutional analysis. As we explain above, the Line Item Veto Act does not establish a rule of law that is binding on a future Congress regardless of legislative intent. Rather, the Act creates a "default rule" that budgetary items within its purview will be discretionary rather than mandatory to the extent provided by the Act. Congress retains the power, however, to render the Act's provisions inapplicable, or otherwise to alter the scope of the President's discretion, with respect to any particular appropriations bill. See pages 30-31, *supra*.

There is consequently no basis for appellees' assertion that, under the Line Item Veto Act, "the President's signature [on an appropriations bill] no longer signifies his approval of the whole [appropriations] Act as one he will faithfully execute." Resp. to J.S. 6. Because Congress is presumed to legislate with an awareness of existing law, see, *e.g.*, *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988), an appropriations bill that does not otherwise specify the scope of the President's discretion must be understood to authorize him either to spend, or to cancel, each item covered by the Act. Thus, when the President exercises the cancellation authority conferred by the Act, he is neither repealing an appropriations law nor refusing to "faithfully execute" it; he is administering it in accordance with its terms.

CONCLUSION

The judgment of the district court should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. Alternatively, the judgment of the district court should be reversed.

Respectfully submitted.

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APPENDIX

The Presentment Clause of the United States Constitution, Art. I, § 7, Cl. 2, provides as follows:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

3

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OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL.,

Appellants,

v.

ROBERT C. BYRD, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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63

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QUESTIONS PRESENTED

Appellees agree with the statement of the Questions Presented made by appellants in their Jurisdictional Statement.

PARTIES TO THE PROCEEDINGS

Appellees agree with the statement of the Parties to the Proceedings made by appellants in their Jurisdictional Statement.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINION BELOW, JURISDICTION, AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. History of The Line Item Veto Act of 1996 . . . 4

B. The Act 8

C. Proceedings Below 11

SUMMARY OF ARGUMENT 17

ARGUMENT 21

I. THE APPELLEES, AS MEMBERS OF CONGRESS, HAVE CONSTITUTIONAL STANDING TO BRING THIS CASE AT THIS TIME 21

A. Appellees Have Article III Standing Because the Act Concretely Interferes With Their Constitutional Lawmaking Powers 22

TABLE OF CONTENTS -- Continued

Page

B. Judicial Resolution of the Constitutional Question Presented Does Not Offend the Principle of Separation of Powers . . 31

II. THE TEXT AND STRUCTURE OF ARTICLE I FORBID CONGRESS TO GRANT THE PRESIDENT UNILATERAL POWER TO MAKE OR REPEAL A LAW, AS IT HAS DONE IN THE LINE ITEM VETO ACT 33

A. Article I Prescribes the Exclusive Means for Making Federal Law 34

B. The Line Item Veto Act Violates the Constitution's Requirements for Making, Amending, and Repealing Federal Law 37

C. The Act Is an Abdication of the Power To Make Laws, Not a Delegation of Discretionary Spending Authority. 42

CONCLUSION 51

TABLE OF AUTHORITIES

CASES Page

A.L.A. Schecter Poultry Corp. v. United States,
295 U.S. 495 (1935) 44
American Power & Light Co. v. SEC,
329 U.S. 90 (1946) 47
Baker v. Carr,
369 U.S. 186 (1962) 27, 28
Barnes v. Kline,
759 F.2d 21 (D.C. Cir. 1984), *vacated as moot sub nom. Burke v. Barnes*,
479 U.S. 361 (1987) 21, 28
Bennett v. Spear,
117 S. Ct. 1154 (1997) 21, 23, 26
Bond v. Floyd,
385 U.S. 116 (1966) 28
Bowsher v. Synar,
478 U.S. 714 (1986) 34, 41-42
Buckley v. Valeo,
424 U.S. 1 (1976) . . . . . *passim*
City of New Haven v. United States,
634 F. Supp. 1449 (D.D.C. 1986), *aff'd*,
809 F.2d 900 (D.C. Cir. 1987) 4
Coleman v. Miller,
307 U.S. 433 (1939) 27, 28
Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 27
Dyer v. Blair,
390 F. Supp. 1291 (N.D. Ill. 1975) 28
FEA v. Algonquin SNG, Inc.,
426 U.S. 548 (1976) 47

TABLE OF AUTHORITIES -- Continued

Page

Field v. Clark,
143 U.S. 649 (1892) 15, 36, 43, 48
Flast v. Cohen,
392 U.S. 83 (1968) 32
Goldwater v. Carter,
617 F.2d 697 (D.C. Cir. 1979), *vacated on other grounds*, 444 U.S. 996 (1979) 21-22
Harrington v. Schlesinger,
528 F.2d 455 (4th Cir. 1975) 31
Hope Natural Gas v. Federal Power Coomission,
196 F.2d 803 (4th Cir. 1952) 47
INS v. Chadha,
462 U.S. 919 (1983) . . . . . *passim*
Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980) 46
J. W. Hampton, Jr. & Co. v. United States,
276 U.S. 394 (1928) 48
Kennedy v. Sampson,
511 F.2d 430 (D.C. Cir. 1974) 22
Lichter v. United States,
334 U.S. 742 (1948) 47
Loving v. United States,
116 S. Ct. 1737 (1996) 43, 47
Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) . . . . . *passim*
Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 15, 30-31, 41-42
Mistretta v. United States,
488 U.S. 361 (1989) 47, 50
Michel v. Anderson,
14 F.3d 623 (D.C. Cir. 1994) 21, 27-28

TABLE OF AUTHORITIES -- Continued

Page

Moore v. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984) 31, 32

NBC v. United States, 319 U.S. 190 (1943) 47

New York Central Securities Corp. v. United States, 287 U.S. 12 (1932) 47

Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville, 508 U.S. 656 (1993) 26

Opp Cotton Mills v. Administrator, Wage and Hour Division, 312 U.S. 126 (1941) 49

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 44

Powell v. McCormack, 395 U.S. 486 (1969) 28, 33

Public Citizen v. United States Department of Justice, 491 U.S. 440 (1989) 29

Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989) 47

Synar v. United States, 626 F. Supp. 1374 (D.D.C.), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986) 22, 49, 50

The Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813) 46, 48

Thomas v. Union Carbide Agriculture Products Co., 473 U.S. 568 (1985) 26

Touby v. United States, 500 U.S. 160 (1991) 47

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) 21

TABLE OF AUTHORITIES -- Continued

Page

Train v. City of New York,
420 U.S. 35 4
U.S. Term Limits, Inc. v. Thornton,
115 S. Ct. 1842 (1995) 3, 38
United States v. Curtiss-Wright Corp.,
299 U.S. 304 (1936) 48
United States v. Richardson,
418 U.S. 166 (1974) 31
Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 23
Warth v. Seldin,
422 U.S. 490 (1975) 22
Wayman v. Southard,
23 U.S. (10 Wheat.) 1 (1825) 46
Whitmore v. Arkansas,
495 U.S. 149 (1990) 15, 25
Yakus v. United States,
321 U.S. 414 (1944) 47
Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 33

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 1 33
U.S. Const. art. I, § 7, cl. 2 . . . . . *passim*
U.S. Const. art. II, § 3 33

TABLE OF AUTHORITIES -- Continued

STATUTES

	Page
Impoundment Control Act of 1974, Pub. L. No. 93-344, tit. 10, 88 Stat. 332 (codified as amended at 2 U.S.C. § 681 et seq.)	4
Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037	49
Pub. L. No. 100-119, tit. 2, § 206(a), 101 Stat. 785 (1987) (codified at 2 U.S.C. § 684(b)	5
2 U.S.C. § 682(1)	4
2 U.S.C. § 683	5
2 U.S.C. § 684(a)	4
2 U.S.C. § 684(b)	4
2 U.S.C. § 691(a)	8
2 U.S.C. § 691(c)	10
2 U.S.C. § 691a	8
2 U.S.C. § 691b(a)	8
2 U.S.C. § 691d	10
2 U.S.C. § 691e(4)	9, 20, 39
2 U.S.C. § 691e(5)	8
2 U.S.C. § 691e(6)	10
2 U.S.C. § 691e(7)	8, 44
2 U.S.C. § 691e(9)	9
2 U.S.C. § 692(a)	11, 21
2 U.S.C. § 692(c)	11, 26
47 U.S.C. § 307(a)	47

LEGISLATIVE MATERIALS

H.R. 2, 104th Cong. (1995)	9, 40
H.R. 1469, 105th Cong. (1997)	13
S. 672, 105th Cong. (1997)	13
H.J. Res. 4, 104th Cong. (1995)	5

TABLE OF AUTHORITIES --Continued

Page

H.J. Res. 6, 104th Cong. (1995) 5
H.J. Res. 17, 104th Cong. (1995) 5
S.J. Res. 2, 104th Cong. (1995) 5
S.J. Res. 14, 104th Cong. (1995) 5
S.J. Res. 15, 104th Cong. (1995) 5
S.J. Res. 16, 104th Cong. (1995) 5
H.R. Rep. No. 104-11. (1995) 6
S. Rep. No. 104-9 (1995) 6
S. Rep. No. 104-10 (1995) 5
H.R. Conf. Rep. No. 104-491 (1996) . . . . . *passim*
Line Item Veto: The President's Constitutional Authority, Hearing on S. Res. 195 Before the Subcomm. on the Constitution of the Comm. on the Judiciary, 103rd Cong. (1994) 37
The Line-Item Veto: A Constitutional Approach: Hearing on S.J. Res. 2 and 16 Before the Senate Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary, 104th Cong. (1995) 5, 6, 36-37
Item Veto: State Experience and Its Application to the Federal Situation, House Comm. on Rules, 99th Cong. (Dec. 1986) (committee print) 3
The Constitution of the United States of America: Analysis and Interpretation, Senate Doc. No. 99-16 (1987) 49
The Constitution of the United States of America: Analysis and Interpretation, Senate Doc. No. 103-6 (1996) 48
141 Cong. Rec. H1138 (daily ed. Feb. 2, 1995) 11
141 Cong. Rec. S4140 (daily ed. Mar. 17, 1995) 7
141 Cong. Rec. S4158 (daily ed. Mar. 20, 1995) 7
141 Cong. Rec. S4192 (daily ed. Mar. 20, 1995) 7

TABLE OF AUTHORITIES -- Continued

Page

141 Cong. Rec. S4217 (daily ed. Mar. 21, 1995) 6
141 Cong. Rec. S4220-22 (daily ed. Mar. 21, 1995) . . . 7
141 Cong. Rec. S4224-35 (daily ed. Mar. 21, 1995) . . . 6
141 Cong. Rec. S4244-45 (daily ed. Mar. 21, 1995) . 6, 11
141 Cong. Rec. S4479 (daily ed. Mar. 23, 1995) 7
141 Cong. Rec. S8202-03 (daily ed. June 13, 1995) . . 30
141 Cong. Rec. S2937 (daily ed. Mar. 27, 1996) 7
141 Cong. Rec. S2941 (daily ed. Mar. 27, 1996) 7
141 Cong. Rec. S2955 (daily ed. Mar. 27, 1996) 7
141 Cong. Rec. S2960 (daily ed. Mar. 27, 1996) 3
141 Cong. Rec. S2969 (daily ed. Mar. 27, 1996) 7
141 Cong. Rec. S2978 (daily ed. Mar. 27, 1996) 3
141 Cong. Rec. H2976 (daily ed. Mar. 28, 1996) 7
141 Cong. Rec. H2978 (daily ed. Mar. 28, 1996) 7

EXECUTIVE MATERIALS

9 Op. Off. Legal Counsel 28 (1985) 37
12 Op. Off. Legal Counsel 128 (1988) 4, 36, 37
Press Release, 1997 WL 174185 (White House, Apr. 11, 1997) 30
Statement of the President, Upon Signing S. 4 (Apr. 9, 1996) 30
William Howard Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations* (1916) 37
33 *Writings of George Washington* (John C. Fitzpatrick ed. 1940) 4, 36

TABLE OF AUTHORITIES -- Continued

Page

BOOKS, TREATISES AND LAW REVIEWS

Richard Briffault, *The Item Veto in State Courts*, 66 Temple L. Rev. 1171 (1993) 3

2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed. 1836) 35

The Federalist No. 22 (Hamilton) 34

The Federalist No. 51 (Madison) 34, 35

The Federalist No. 62 (Madison) 35

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The Records of the Federal Convention of 1787 (Max Farrand ed. 1966) 30, 34, 35

No. 96-1671

In the Supreme Court of the United States

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL.,

Appellants,

v.

ROBERT C. BYRD, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLEES

OPINION BELOW, JURISDICTION, AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellees agree with the statements of the Opinion Below, Jurisdiction, and Constitutional and Statutory Provisions Involved made by appellants in their Jurisdictional Statement.

STATEMENT

The Line Item Veto Act of 1996, Pub. Law No. 104-130, 110 Stat. 1200 (to be codified at 2 U.S.C. §§ 681 note, 691 *et seq.*) (the "Act"), fundamentally changes the process for making federal appropriation, direct spending, and tax laws. Under the Act, when Members of Congress vote to pass a bill that contains certain kinds of "items," they are not voting for that bill only, but rather voting to give the President a menu of provisions from which he may unilaterally select the final combination. The district court held correctly that (a) Members have constitutional standing to challenge this change in the legal effect of votes they are about to cast, and (b) the Constitution does not permit Congress to give the President this power to make federal law, either by vetoing items as he signs a bill or by unilaterally repealing items as soon as a moment later.

The Act was signed by President Clinton on April 9, 1996, and became effective on January 1, 1997.[1] The Act itself provides that "Any Member of Congress" may bring an action to declare provisions of the Act unconstitutional. Plaintiffs (appellees in this Court) are three Senators, one former Senator, and two Members of the House of Representatives. Defendants (appellants) are Franklin D. Raines, the Director of the Office of Management and Budget, and Robert E. Rubin, the Secretary of the Treasury, each of whom has official responsibility for executing Presidential "cancellations" under the Act.

As its title indicates, the Act confers on the President, for eight years, the power to item veto provisions of future appropriation, direct spending, and tax bills. As has been

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[1] The Joint Appendix ("J.A.") includes a Legislative History Summary ("L.S.") filed below by plaintiffs and an Index of Legislative History Materials filed jointly by the parties.

widely noted, 43 state governors have somewhat similar powers, but in every case their state constitutions explicitly so provide.[2] Under the Act, the President may, immediately or up to five days after signing a bill, "cancel" any dollar amount of discretionary budget authority, item of new direct spending, or "limited tax benefit" by sending a cancellation message to Congress. Cancellation is permanent and irreversible. Congress may restore an item by passing a "disapproval bill," but this is a new law that must be passed in the usual manner including, if necessary, an override of the President's veto by a two-thirds vote of each House.

Proponents of the Act recognized that it brought about a major shift of power from Congress to the President. *See* 141 Cong. Rec. S.2960 (daily ed. Mar. 27, 1996) (statement of Sen. Gramm) ("no doubt about it—and the distinguished Senator from West Virginia [appellee Senator Byrd] is right—it changes the balance of power between the Congress and the President in one fundamental way: It gives the President enhanced power to say 'no' to spending."); *id.* at S.2978 (statement of Sen. Kyl) ("Make no mistake about it, this bill will shift a great deal of new power to the President."). The question presented, of course, is not whether this shift of power is desirable, but whether it is constitutional. *See U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1871 (1995).

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[2] *See Item Veto: State Experience and Its Application to the Federal Situation*, House Comm. on Rules, 99th Cong., at Appendix C-1 (Dec. 1986) (committee print); *see also* Richard Briffault, *The Item Veto In State Courts*, 66 Temple L. Rev. 1171, 1175-77 (1993).

A. History of The Line Item Veto Act of 1996

As the district court recognized, ever since President Washington recognized that the Constitution permitted him only to sign or veto a bill "in toto,"[3] Presidents have sought the authority to veto selected provisions of bills. Jurisdictional Statement ("J.S.") at 5a (citing 12 Op. Off. Legal Counsel 128, 157-65 (1988)). Some Presidents have also sought to cut programs and expenditures by "impounding" (refusing to spend) appropriated funds. *See Train v. City of New York*, 420 U.S. 35, 44-46 (1975); *City of New Haven v. United States*, 634 F. Supp. 1449, 1454-55 (D.D.C. 1986) (summarizing cases), *aff'd*, 809 F.2d 900 (D.C. Cir. 1987). Congress responded by regulating impoundments, in a constitutional manner, in the Impoundment Control Act of 1974, Pub. L. No. 93-344, Tit. 10, 88 Stat. 332 (codified as amended at 2 U.S.C. § 681 *et seq.*) ("ICA"). This case concerns an unconstitutional "enhancement" to the ICA, known as "enhanced rescission."

The ICA permits the President to defer spending certain authorized amounts for a period up to the end of the current fiscal year, 2 U.S.C. §§ 682(1), 684(a), but it does not permit the President to rescind such authority permanently.[4] Instead,

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[3] *See* 33 *Writings of George Washington* 96 (John C. Fitzpatrick ed. 1940).

[4] The ICA of 1974 permitted the President to defer budget authority temporarily upon the transmission of a special message, but required that the money nevertheless be expended by the end of the fiscal year. Pub. L. 93-344, tit. 10, § 1013, 88 Stat. 334 (1974) (as then codified at 2 U.S.C. § 684(a)). If Congress disagreed with the President's deferral decision, one house could pass a legislative veto making the appropriation available for immediate obligation. 2 U.S.C. § 684(b) (now repealed). After this Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), the ICA was amended to delete the legislative veto provision

(continued...)

the President may "propose[]" to Congress "that such budget authority should be rescinded for fiscal policy or other reasons," but such a rescission takes effect only if Congress acts on the proposal by passing a law. *Id.* § 683. The Line Item Veto Act "enhances" this arrangement by allowing the President to rescind spending provisions himself, without the passage of a new law.

The 104th Congress also considered a more modest, and constitutional, amendment to the ICA to deal with the fact that the ICA did not require Congress even to consider a presidential rescission proposal. Bills such as S.14, referred to in Congress as "expedited rescission" bills, would have required that any presidential rescission proposal be put to a prompt vote. *See* S. Rep. No. 104-10 at 1 (1995). In the words of its sponsors, S. 14 would have "guarantee[d] the President a vote on his rescission proposals while maintaining the delicate balance of power between the two branches on spending authority." *Id.* [5]

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[4] (...continued)
and to impose substantial limits on the use of deferral authority. *See* Pub. L. No. 100-119, tit. 2, § 206(a), 101 Stat. 785 (1987) (codified at 2 U.S.C. § 684(b)).

[5] Congress also considered constitutional amendments to give the President the item veto power, but they were never voted on. S.J. Res. 2, 14, 15, and 16, 104th Cong. (1995); H.J. Res. 4, 6, and 17, 104th Cong. (1995); *see also The Line-Item Veto: A Constitutional Approach: Hearing on S.J. Res. 2 and 16 Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 104th Cong. (1995). A statutory alternative, offered on the Senate Floor, was to give the President the equivalent of item veto power through "separate enrollment": after a spending or tax bill had been agreed upon by both Houses, the enrollment clerks would divide it into separate items and prepare a separately enrolled bill for each item; Congress would then pass the bills en masse, but the President could then sign or reject each bill separately. J.A. at 77-79 (L.S. at 12-14). Both
(continued...)

Congress decided to go further and give the President what it labeled—accurately—the Line Item Veto power: the power to strike some provisions of a bill in conjunction with signing the remainder into law. The mechanism chosen was to give the President authority not merely to "propose" rescissions for congressional consideration, as under the ICA, but to "cancel" authorization and spending items unilaterally. *See* S. Rep. No. 104-9, at 1 (1995) (bill would "expand the President's power to reduce discretionary spending by giving him the authority to cancel budget authority without any other action required by Congress"). Members were quite clear that their intention was to invert the legislative process: "Presidential proposals will now become law unless Congress takes action to stop them." H.R. Rep. No. 104-11, pt. 2, at 9 (1995).

All concerned agreed that the Act's effects on the legislative process would be dramatic. The Administration's spokesperson described the enhanced rescission bill that became the Act as a "two-thirds bill" because the President's cancellation order "is final and what happens in Congress is that Congress then must vote a new bill to actually proceed with that funding, which the President can then veto." *The Line-Item Veto: A Constitutional Approach: Hearing on S.J. Res. 2 and 16 Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 104th Cong. at 34 (1995) ("1995 Judiciary Comm. Hrgs.") (statement of Assistant Attorney General Dellinger). Senator McCain echoed this point in floor debate: "[The

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[5] (...continued)
constitutional and administrative objections were raised to this cumbersome process, and although it passed the Senate, it did not survive the Joint Conference. *See* J.A. at 82-83 (L.S. at 18); 141 Cong. Rec. S4217 (daily ed. Mar. 21, 1995) (statement of Sen. McCain); *id.* at S4224-35 (statement of Sen Byrd); *id.* at S4244 (statement of Sen. Exon).

objective of the Act is to require] a two-thirds vote on the part of both Bodies in order to override the President's veto—that is what 43 Governors have and that is what the constitutional meaning of veto is . . . ." 141 Cong. Rec. S4158 (daily ed. Mar. 20, 1995) (statement of Sen. McCain); *see also id.* S4192 (daily ed. Mar. 20, 1995), S4220-22 (daily ed. Mar. 21, 1995), S4479 (daily ed. Mar. 23, 1995) (statements of Sens. Coats and Craig).

Members also recognized that the existence of the Act would affect Member behavior and the legislative process well before any exercise of the item veto. *See, e.g.*, 141 Cong. Rec. S4140 (daily ed. Mar. 17, 1995) (statement of Sen. Coats) ("[I]t will change the spending habits of Congress . . . [w]e will never know the amount of money we save for items that will not be put in these new bills for fear of exposure. Because the President has the line-item veto, it will change the way we put the bills together in the first place."); *id.* S4220 (daily ed. Mar. 21, 1995) (the line item veto power "will fundamentally change the way we think and behave"). Members also recognized that the President's new power could affect their votes on nonspending legislation and other matters (such as appointments) coming before Congress. *See, e.g.*, 141 Cong. Rec. H2976, H2978 (daily ed. Mar. 28, 1996) (statements of Reps. Beilenson and Skaggs); *id.* at S2937, S2941, S2955, S2969 (daily ed. Mar. 27, 1996) (statements of Sens. Byrd, Hatfield and Bumpers).

B. The Act

The full title of the Act is "An Act to give the President line item veto authority with respect to appropriations, new direct spending, and limited tax benefits." H.R. Conf. Rep. No. 104-491 at 14 (1996). It provides that the President may "cancel in whole" any (1) "dollar amount of discretionary

budget authority," (2) "item of new direct spending," or (3) "limited tax benefit" by sending Congress a "special message" immediately (or within five days) after signing a bill containing the item. 2 U.S.C. § 691(a). Cancellation takes effect when Congress receives the special message. 2 U.S.C. § 691b(a).

The President must determine that the cancellation will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." *Id.* § 691(a)(A). No more specific or substantive determination is required. Only one special message is to be sent with respect to each bill. A special message must state all amounts, items, and benefits to be canceled, recite the three required determinations, set forth the President's reasons for the cancellation, and describe the fiscal and programmatic effects of the cancellation. *Id.* § 691a(b).

The Act defines "dollar amounts of discretionary budget authority" to include any whole amount of appropriation either set forth in the text of the law or found in (or determinable from) the tables, charts, or explanatory text of statements or committee reports accompanying a bill. 2 U.S.C. § 691e(7). Items of new "direct spending" are "(A) budget authority provided by law (other than an appropriations law); (B) entitlement authority; and (C) the food stamp program," 2 U.S.C. § 691(e)(5); "items" thus include "entitlement" payments to individuals or state and local governments. H.R. Conf. Rep. No. 104-491, at 36 (1996). "Limited tax benefits," covered by the Act at the insistence of many Members, *see* J.A. at 82 (L.S. at 17), are defined to include any revenue-losing provision that gives tax relief to 100 or fewer persons in any fiscal year or grants "temporary or permanent transitional relief" from a change in the Internal

Revenue Code to 10 or fewer persons. 2 U.S.C. § 691e(9).[6]

The Act defines "cancel" as "to rescind" (with respect to any dollar amount of discretionary budget authority) and to "prevent . . . from having legal force or effect" (with respect to items of new direct spending or limited tax benefits). 2 U.S.C. § 691e(4). The purpose of the term and its definition was to make it clear that the President's action would be permanent and irreversible: "The term 'cancel' was specifically chosen, and is carefully defined. . . . The conferees intend that the President may use the cancellation authority to surgically *terminate* federal budget obligations." H.R. Conf. Rep. No. 104-491, at 20 (1996) (emphasis added). For taxes, cancellation would mandate "collect[ion of] tax that would otherwise not be collected or den[ial of] the credit that would otherwise be provided." *Id.* at 29. Congress was aware that, by choosing the word "rescind," it was giving the President alone the power to do exactly what the ICA had previously required a new law to accomplish. *See id.*

The history of the term "cancel" is also important. An earlier version of what became the Act used the terms "veto" and "repeal." H.R. 2, 104th Cong. § 2 (1995). Assistant Attorney General Dellinger warned the Senate that constitutional questions would be raised about a statute purporting "to authorize the President to 'veto' targeted tax benefits after they become law, thus resulting in their 'repeal.'" H.R. Conf. Rep. No. 104-491, at 49 (1996). He said that "use of the terms 'veto' and 'repeal' is constitutionally problematic" because the Presentment Clause, Art. I, Section 7, Clause 2, provides that the President only can exercise his 'veto' power before a provision becomes law"

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[6] Amendments supported by the Judicial Conference of the United States to create exceptions for certain spending relating to the Judiciary were defeated in both Houses. J.A. at 67-70, 82 n. 4 (L.S. at 1-2, 4-5, 17 n.4).

and "the word 'repeal' . . . suggests that the President is being given authorization to change existing law on his own [which] arguably would violate the plain textual provisions of Article I, § 7 of the Constitution, governing the manner in which federal laws are to be made and altered." *Id.* His proposal for avoiding these "constitutional shoals" was to "eliminate[] the word 'veto' from the targeted tax benefit provision, and confer[] on the President the power to *suspend* (rather than 'repeal') such benefits." *Id.* (emphasis in original) The Administration made the same point in a letter to the Joint Conferees from Alice Rivlin, appellant Raines's predecessor. J.A. at 91-92 (attachment to L.S.). These warnings, however, produced a merely cosmetic change. The word ultimately chosen was "cancel." The purpose and effect of the statute remained unchanged: to give the President the functional equivalent of the line item veto, through the mechanism of unilateral presidential termination of enacted provisions of law.

In order to restore a canceled item, Congress must pass a "disapproval bill." 2 U.S.C. §§ 691d, 691e(6). The Act provides for expedited consideration of disapproval bills, *id.* § 691d, which are not subject to the President's cancellation authority under the Act. *Id.* § 691(c). But a disapproval bill is a new law, which must be passed by both Houses and presented to the President in the manner prescribed by Article I, Section 7, Clause 2 of the Constitution. The cancellation "is nullified only if a disapproval bill is enacted into law [in which case the] effective date for any cancellation . . . is the original date provided in the law to which the cancellation applied." H.R. Conf. Rep. No. 104-491, at 22 (1996).

Finally, the Act provides that "Any Member of Congress or any individual adversely affected . . . may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on

the ground that any provision of [the Act] violates the Constitution." 2 U.S.C. § 692(a). The Act provides for direct appeal to this Court and directs both courts "to expedite to the greatest possible extent the disposition of any matter brought under [this provision]." *Id.* § 692(c). The Act contains these provisions because Members of Congress recognized that the Act would have an immediate effect on Members in exercising their constitutional roles as lawmakers, that the Act's constitutionality was in doubt, that this "constitutional cloud" would create uncertainty about the validity of vetoed items and other provisions of future statutes,[7] and that the constitutional questions should therefore be decided as soon as possible and in advance of a presidential exercise of cancellation authority.[8]

C. Proceedings Below

Appellees filed their complaint on January 2, 1997, the first business day after the Act became effective, seeking a declaratory judgment. Appellants moved to dismiss for lack of jurisdiction, and appellees moved for summary judgment on

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[7] *See, e.g.*, 141 Cong. Rec. S4244 (daily ed. Mar. 21, 1995) (statement of Sen. Exon) ("[W]e do not want a constitutional cloud hanging over what I think we will eventually pass. . . . The pending amendment [the judicial review provision] simply allows a speedy resolution of this constitutional issue. It does not allow a legal challenge to hang over all the bills for years upon years."); 141 Cong. Rec. H1138 (daily ed. Feb. 2, 1995) (statement of Rep. Deal) (offering expedited review provision because "until that constitutionality [of the Act] is clarified, it will be under a cloud"); 141 Cong. Rec. S4244-45 (daily ed. Mar. 21, 1995) (colloquy of Sens. Simon and McCain).

[8] In conference, a severability provision that had been added to the judicial review section in the Senate, 141 Cong. Rec. S4244 (daily ed. Mar. 21, 1995), was deleted without explanation. H.R. Conf. Rep. No. 104-491, at 41 (1996).

the merits. In support of their motion, appellees each submitted a declaration describing injuries the Act causes him individually as a Member of Congress.

As described in these declarations, even in advance of any vote in Congress, the Act affects appellees' powers in negotiating and drafting legislation. Former Senator Hatfield stated, based on his 25 years of negotiating and shepherding appropriations bills to passage, that the Act would have "an immediate and pervasive impact on the formulation of legislation." J.A. 39-40 (Hatfield Decl. ¶ 4). Appellees explained that, prior to the Act, Members could reach compromises with each other on spending and tax bills, accepting undesired inclusions (or omissions) in return for desired provisions, because every Member had assurance that a bill could take effect only in the agreed form, and that there would be a new opportunity to vote on any changes. J.A. 33-34, 43-45, 63 (Byrd Decl ¶ 18; Levin Decl. ¶ 6; Waxman Decl. ¶ 7). Under the Act, Members cannot reach such compromises because the President has the power to undo them. J.A. 35-36, 39-40, 42-43, 59, 63 (Byrd Decl. ¶¶ 20-21; Hatfield Decl. ¶ 4; Levin Decl. ¶¶ 4, 6; Skaggs Decl. ¶ 6; Waxman Decl. ¶ 7).

Appellees also stated that the Act changes, in a manner they allege is unconstitutional, the legal effect of votes they are certain to cast before the start of fiscal year 1998 on October 1, 1997. They explained that, since the Act gives the President the power to alter bills in connection with signing them, a Member's vote for such a bill has different consequences than it had before. Under the Act, Members will vote on bills, parts of which may be eliminated by unilateral presidential action subsequent to their votes. J.A. 33-34, 43-46 (Byrd Decl. ¶ 18; Levin Decl. ¶¶ 6-7). Using this item veto power, the President can reshape legislation to produce results that would never have passed Congress. J.A.

43-46, 62 (Levin Decl. ¶¶ 6-7; Waxman Decl. ¶ 3). Until now, when a Member voted for an appropriation or tax bill containing more than one item (as virtually all such bills do), he knew that his vote could be counted only for that bill, with exactly those items and only those items, and that any variation would require another vote. Under the Act, the Member's same vote on the same bill becomes a vote to give the President a menu of items that he may choose from, without going back to Congress for another vote. By forcing Members, whenever they vote for an appropriation or tax bill, to give the President a range of alternative bills, the Act injures appellees whenever a bill comes up for a vote, even if, in a particular instance, the President later decides to approve everything in the bill. J.A. 33-34, 44-45 (Byrd Decl. ¶¶ 18-19; Levin Decl. ¶ 6B).

Appellees also explained that the authority granted the President under the Act alters the ground rules and hence the balance of power between the Executive Branch and Members of Congress, and among Members of Congress, over both spending and non-spending legislation, as well as over other matters in Congress. J.A. 35-36, 40, 54, 63 (Byrd Decl. ¶ 20; Hatfield Decl. ¶ 5; Moynihan Decl. ¶ 17; Waxman Decl. ¶ 8). Now, when considering a vote on any matter in which the President has an interest (*e.g.*, other legislation, a treaty, or a presidential appointment) or thinking of criticizing the President, each appellee must weigh the President's power to line item veto an appropriation or tax item of interest to him. J.A. 43-44, 58 (Levin Decl. ¶ 6A; Skaggs Decl. ¶ 3).

Although the President has not yet been presented with any bills containing cancelable items, budget negotiations and appropriation committee hearings for fiscal year 1998 have been under way for some time. As of May 1997, Congress has begun to act on supplemental appropriations bills. H.R. 1469, 105th Cong. (1997); S. 672, 105th Cong. (1997).

Votes on full appropriations bills for fiscal 1998 are certain to occur within the next several months as mandated by section 300 of the Congressional Budget Act of 1974. J.A. 32-33 (Byrd Decl. ¶ 16). Thus, by early summer, votes on full appropriations bills subject to the Act will be cast first at the committee level in each House, and then on the floors of the two chambers. During September, votes on final passage of appropriations bills will occur in both chambers in order to complete action before the beginning of the fiscal year. J.A. 32-33 (Byrd Decl. ¶ 16).

Appellants cross-moved for summary judgment. They submitted no evidence in response to appellees' declarations and agreed that there were no factual disputes requiring a trial. Oral argument was held on March 21, 1997, and on April 10, 1997, the district court granted summary judgment for appellees.

First, the court held that appellees had asserted sufficient injury to give them Article III standing. Specifically, the court found that the Act "dilutes [Members'] Article I voting power" because, under the Act, "the Member's vote operates only to present the President with a 'menu' of items from which he can select." J.S. at 11a. "Thus, plaintiffs' votes mean something different from what they meant before, for good or ill, and plaintiffs who perceive it as the latter are thus 'injured' in a constitutional sense whenever an appropriations bill comes up for a vote, whatever the President ultimately does with it." *Id.* at 11a-12a. The court also found that the Act harms appellees by altering the dynamics of lawmaking, because compromises between individual lawmakers can no longer be binding because they must take into account the President's cancellation power. *Id.*

The district court also rejected appellants' contention that the case would not be constitutionally "ripe" until an item has been vetoed. Noting that this case "will not be clarified" by

the President's exercise of an item veto, *id.* at 14a, the court found that appellees alleged current and imminent injuries, because the "threat of the veto" hangs over them like the "sword over Damocles," creating a "'here-and-now'" subservience to the President before and after Members vote on appropriations bills. *Id.* at 13a (quoting *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Airport Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991)). For these reasons, and because votes on appropriations bills are inevitable and "certainly impending" (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)), the district court concluded that it was appropriate for it to accede to Congress's directive to address the constitutional cloud over the Act as swiftly as possible. J.S. at 14a.

On the merits, the district court framed the question as whether the Act was merely an enlargement of historical impoundment powers, and hence a valid delegation of discretion in executing spending and tax bills, as appellants had argued, or "rather a radical transfer of the legislative power to repeal statutory law," as appellees asserted. *Id.* at 17a. While recognizing that Congress may delegate impoundment proposal authority to the President, the district court held that "it may not confer the power permanently to repeal an appropriation or tax benefit that has become the law of the United States" because that power must be exercised by Congress and may not be delegated. *Id.*

The Presentment Clause, the district court wrote, enforces "bicameralism" and circumscribes the President's ability to act unilaterally. *Id.* at 17a (citing *Field v. Clark*, 143 U.S. 649, 692-93 (1892)). The President's contribution to the lawmaking process is "merely a qualified check on the will of the legislature." J.S. at 17a. Once the President signs a bill into law, his only constitutional responsibility is to take care that the law is faithfully executed. By permitting the President

to cancel portions of a statute, Congress has attempted to give the President the unilateral power to effect a partial repeal, "precisely what the Presentment Clause was designed to prevent." *Id.* at 21a-22a.

The district court rejected appellants' argument that the Act represented merely an extension of the discretionary power not to spend. It acknowledged that the courts have upheld the delegation of "vast authority to the Executive Branch" to make and change rules so long as those rules further the will of Congress. *Id.* at 23a. But, the court wrote, appellants are mistaken in assuming that they "must only surmount the delegation doctrine," because the Act does not confer a delegable power but, instead, cedes "basic legislative authority." *Id.* at 24a. "Cancellation under the Act is not the same as impoundment" but instead is "equivalent to repeal." *Id.* at 25a. The court recognized that cancellation is permanent, closely tied to the President's "approval" of the bill, and not an exercise of executive authority based on changed circumstances. *Id.* The court further observed that never before had Congress attempted to give away the power to shape the contents of a statute, and "canceling . . . cannot be considered [the law's] faithful execution." *Id.* at 26a.

Finally, the district court noted the breadth of appellants' theory of delegation, under which "there is virtually no limit to the express Article I powers Congress may delegate," even the power to reconfigure an environmental or civil rights law. *Id.* Because Congress may not hand off to the President authority over "fundamental legislative choices," the Act violates the constitutionally prescribed procedures for lawmaking. *Id.* at 27a-28a.

SUMMARY OF ARGUMENT

This case presents two questions. First: Could Congress constitutionally authorize its own Members in the Line Item Veto Act to challenge the constitutionality of that Act? The district court held correctly that Congress could do so because the Act inflicts concrete present and imminent injuries on individual Members in the exercise of their lawmaking powers under Article I of the Constitution.

Second: May the President constitutionally be given the power to alter future federal statutes by striking provisions of appropriations, direct spending, and tax bills in conjunction with signing them into law? The district court held correctly that the President cannot be given this item veto power either directly or, as under the Act, slightly disguised as a unilateral right to cancel, and thus repeal, statutory provisions the instant after signing them.

I. The purpose of the standing requirement of Article III is to confine the federal courts to their constitutional duty of resolving cases and controversies and to prevent an inappropriate intrusion into matters properly left, in a democratic society, to the elected branches of government. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992). The standing requirement is, of course, equally applicable to plaintiffs who are Members of Congress, and appellees recognize that some cases brought by Members may cause concern about improper judicial intrusion. But all Article III concerns are satisfied where (a) the Member plaintiffs allege concrete, individual, judicially redressable injuries; (b) Congress has, by law, authorized Members to bring this suit at this time; and (c) the claims are themselves otherwise appropriate for judicial resolution.

Appellees have alleged the kind of injury required by this Court's decisions. The core power and responsibility of their

job is to vote on the final passage of bills. The Act injures them because it changes the effect of their votes on important categories of bills. It denies them the right to vote for a bill only in the exact form in which it will have operative effect. Instead, it unconstitutionally converts their votes into votes for a range of options from which the President may pick and choose. This injury is plainly imminent, since negotiations and deliberations about the contents of spending and tax bills are occurring now, and the law requires actual votes on such bills very soon. Nor is there any doubt that the injury is redressable by a declaration that the Act is unconstitutional. If appellees were members of any other occupation, and similarly alleged that a statute unconstitutionally altered the legal consequences of a core occupational activity, they would clearly have standing.

Contrary to arguments made by appellants below and in their Jurisdictional Statement (J.S. at 18), appellees are not arguing that Members have standing whenever they have a complaint about "the operation or outcome of the legislative process," and the Court need not endorse Member standing in all of the cases in which lower federal courts have found it. Appellees have Article III standing here because the Act unconstitutionally interferes with their individual constitutional prerogatives and duties as lawmakers by changing the meaning of the votes they cast.

Any concerns about the appropriateness of judicial resolution of the constitutional question presented are eliminated by two considerations. First, the Act itself authorizes Members to bring this case and directs the courts to decide the issue as expeditiously as possible. Second, as appellants appear to concede, if the present claims were brought at some much later date by a non-Member plaintiff (*e.g.*, an individual or firm with a specific economic interest in an unconstitutionally vetoed item), the issue here presented

is one that the Court would decide. The separation of powers and the robustness of the political process will be bolstered, not threatened, by a decision of this Court resolving the constitutional issue presented.

II. Article I vests the responsibility for enacting, amending, and repealing federal statutes in the two Houses of Congress, both of which must pass every bill in exactly the same final form before it may become law. Article I gives the President only a qualified check on the process: the power to veto a bill *in toto*, subject to congressional override. It denies him the power to modify the law unilaterally, either by item vetoing provisions of a bill as he signs it, so that only the portions he selects become law, or by striking and thus repealing provisions after the bill has become law. These limitations, recognized since the founding of the Republic, have structural importance in our constitutional scheme: they preserve the constitutional role of each House of Congress and its Members in determining what federal law will be.

The Act is an unconstitutional attempt to do indirectly what the text of Article I forbids. The Act's purpose, indicated by its title and repeatedly stated throughout its legislative history, is to give the President the line item veto power that the Constitution denies him, and that is exactly its effect. It authorizes the President to cancel items the instant after signing a bill, conceivably in the same breath (and in no event more than five days later). There is no practical difference between giving the President power to strike items at the same time he signs a bill and giving him power to strike them immediately afterwards.

The mechanism chosen to evade the *in toto* requirement is unconstitutional. To "cancel" an item is to repeal it, and the Constitution requires bicameral passage and presentment to the President for repeals of laws, no less than for enactments. The Act defines "cancel" to mean "rescind" and "prevent . . .

from having legal force or effect." 2 U.S.C. 691e(4). The effect of a cancellation under the Act is to eliminate a provision permanently and irretrievably (subject to passage of a new statute), rather than to take care that it is faithfully executed.

The Act does not, as appellants have argued, merely delegate in a new manner a discretionary power to decline to spend. The Act contains provisions dealing with entitlements and tax benefits to which this explanation is wholly inapplicable. Moreover, the Act gives the President a virtually unfettered power to alter statutes themselves at their enactment, not the continuing discretion to carry out the law as circumstances dictate. In conjunction with signing a statute, the President may permanently strike items as he sees fit, even though they were passed by Congress. But the power disappears after five days, and the President cannot thereafter make or adjust any spending decisions based on post-enactment findings, experience, or changes in circumstances. The Act does not resemble any prior statute examined by this Court granting such discretionary power over spending (or any other activity) because its purpose is not to give the President any form of executive discretion, but rather to give him the line item veto that the Constitution denies him.

ARGUMENT

I. THE APPELLEES, AS MEMBERS OF CONGRESS, HAVE CONSTITUTIONAL STANDING TO BRING THIS CASE AT THIS TIME

The Act provides that "[a]ny Member of Congress . . . may bring an action . . . for declaratory judgment and injunctive relief on the ground that any provision of [the Act] violates the Constitution." 2 U.S.C. § 692(a). As the district court recognized, J.S. at 1a, this review provision was intended to permit challenges before a veto is exercised, and it eliminates all prudential barriers to appellees' standing.[9] The question presented is whether Congress may constitutionally confer standing on its Members to challenge the Act at this time. The district court answered that question affirmatively, relying on a long series of decisions of the D.C. Circuit.[10]

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[9] *See Bennett v. Spear*, — U.S. —, 117 S. Ct. 1154, 1161-62 (1997) (Endangered Species Act's citizen-suit provision removes any prudential barriers to standing); *Buckley v. Valeo*, 424 U.S. 1, 11-12 (1976) (per curiam) (Federal Election Campaign Act's expedited review provision—which is substantially identical to that of the Line Item Veto Act—"provide[s] judicial review to the extent permitted by Art. III," easing standing inquiry); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (Civil Rights Act of 1968 provision authorizing any "person aggrieved" to sue grants standing "as broadly as is permitted by Article III of the Constitution") (citation omitted).

[10] *See, e.g., Michel v. Anderson*, 14 F.3d 623, 625-26 (D.C. Cir. 1994) (House Members have standing to challenge dilution of their votes caused by House Rule allowing territorial delegates to vote in the Committee of the Whole); *Barnes v. Kline*, 759 F.2d 21, 25-26 (D.C. Cir. 1984) (Members have standing to challenge presidential "pocket veto" as nullification of their votes), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979) (en banc), *vacated on other grounds*, 444 U.S. 996

(continued...)

The question of Member standing in this case is a narrow one. We suggest that there is no basis for constitutional concern where three circumstances are present, as they are here. First, the plaintiff Members are asserting a concrete, redressable injury to themselves: the Act changes the legal effect of votes they are sure to cast. Second, the Act itself authorizes Members to bring this case and asks this Court to decide it expeditiously, eliminating any concerns about uninvited intrusion on the political branches. Third, the question presented on the merits is one that the Court would answer at the behest of a non-Member plaintiff with standing (such as an individual or firm that could show it was denied a spending or tax benefit because of an unconstitutional item veto), which eliminates any concern about whether the question itself is suitable for judicial resolution. In these circumstances, there is a concrete case or controversy and no reason to fear that judicial resolution thereof would be inconsistent with the "properly limited role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

A. Appellees Have Article III Standing Because the Act Concretely Interferes With Their Constitutional Lawmaking Powers.

The district court held that appellees have shown the concrete, redressable injury in fact necessary for constitutional standing. The court recognized that Members, like any other plaintiffs, must show "(1) an injury personal to them, (2) that

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[10] (...continued)
(1979) (per curiam); *Kennedy v. Sampson*, 511 F.2d 430, 433-36 (D.C. Cir. 1974); *Synar v. United States*, 626 F. Supp. 1374, 1381-82 (D.D.C.) (three-judge court) (per curiam), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986).

has actually been inflicted by defendants or is certainly impending, and (3) that is redressable by judicial decree." J.S. at 10a (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982)). The court ruled that appellees have sufficiently established that the Act (1) concretely and presently interferes with the Members' powers to negotiate and enact laws because it gives the President the power to unravel any legislative compromise, J.S. at 12a, and (2) changes the legal effect of votes that Members will certainly cast on appropriations bills in upcoming weeks, by transforming any vote for such a bill into a vote for a menu of options from which the President may make his own selections. J.S. at 11a.

Congress and the President certainly believed that individual Members had a concrete interest in the operation of the Act sufficient to confer standing. They are presumed to be aware of this Court's standing jurisprudence, *Bennett*, 117 S. Ct. at 1162, and their adoption of the judicial review provision reflects their judgment that Members had a sufficient interest in their Article I lawmaking powers that they could constitutionally be given the power to seek review. While this does not relieve the Court of its obligation to determine whether a constitutional case or controversy exists, the Court should give these judgments of the political branches due weight in its inquiry. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (recognizing that Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries"); *id.* at 580 (Kennedy, J., concurring) (noting that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy," so long as it "relate[s] the injury to the class of persons entitled to bring suit").

And there is indeed a case or controversy. The appellee Members did not (as appellants suggest, J.S. at 18), assert

merely a generic interest "in the operation or outcome of the legislative process." They alleged specific injuries to themselves in the exercise of a power that is positively identified by Article I of the Constitution: the power to vote on the final passage of legislation. The Act (1) changes the legal effect of Members' votes on spending and tax bills and (2) unconstitutionally increases the President's power (and that of his legislative allies) to influence Member votes on all matters before Congress, interfering with Members' ability to reach legislative compromises.

Appellees' constitutional claim on the merits is that the Act deprives them of their right, as individual Members, to vote on every bill in the exact final form in which it becomes operative as law. That right is embodied in the Presentment Clause, Article I, Section 7, Clause 2, which requires that every bill, before it becomes a law, pass both the House and the Senate and be presented to the President, whose options are limited to signing or returning "it" (or taking no action, in which case "the Same" may become law without his signature). Prior to the effective date of the Act, when a Member voted for a bill, he knew that his vote could be counted only to pass that exact bill and no other: the bill could not subsequently be amended in either House of Congress, or by the President, without giving the Member another opportunity to vote on the amended bill.

The Act injures the appellee Members whenever they vote in favor of a bill containing vetoable items because it alters the meaning of their votes, depriving them of the assurance that only the exact bill on which they are voting may become law. Before the Act, when a Member voted for an appropriations bill containing items "A", "B", and "C", she knew that her vote could be counted only for a bill containing all three items and only those items; any variation would require another vote. Under the Act, the Member's same vote on the same

bill has a dramatically different effect: it becomes a vote to present the President with a menu of items that he may choose from without going back to Congress. When a Member votes for the "A-B-C bill" under the Act, she is now, automatically and unavoidably, voting to present the President with what he can item veto into the "A-B" bill, the "A-C" bill, the "B-only" bill, and every other combination that can be created out of "A", "B", and "C". *See* J.A. at 33-35 (Byrd Decl. ¶¶ 18-19). As the number of items in a bill grows, the number of possible combinations increases exponentially. (For example, a 30-item bill can be item-vetoed into over one billion combinations.) A Member who favors the "A-B-C" bill, but does not favor (or has not had the opportunity to consider) the "B-C" bill without "A", is out of luck: the Act has transformed her vote for the "A-B-C" bill into a vote for the "B-C" bill as well.

This alteration of the legal effect of a Member's vote is an injury in fact as described in this Court's cases. Votes on appropriations bills containing multiple items are "certainly impending" within the meaning of *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990), since there is no doubt that the appellee Members will be called upon to vote on appropriations bills in the next several months. *See* J.A. at 32 (Byrd Decl. ¶ 6). The injury they will suffer when they vote is therefore plainly "imminent." *Defenders of Wildlife*, 504 U.S. at 564 n.2.

Equally clearly, the Member suffers a legally cognizable injury at the moment he votes on an appropriations bill that is subject to the Act, whether or not the President later vetoes any of its items. Options have value: a Member who is not permitted to vote "yea" or "nay" on a single bill in its exact final form, but is unconstitutionally forced to vote "yea" or "nay" on a menu of items from which the President may choose, is forced to surrender an important power at the moment of voting, and to transfer to the President a choice

that the Member is constitutionally entitled to exercise himself. Moreover, the Court has held repeatedly that a plaintiff who has a concrete stake in the outcome of a decisionmaking process has standing to challenge irregularities in that process, even if it is not certain that they will ultimately result in an injurious outcome. *See Bennett v. Spear*, — U.S. —, 117 S. Ct. 1154, 1164-65 (1997); *Defenders of Wildlife*, 504 U.S. at 573 n.7; *cf. Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (non-minority contractors had standing to challenge allegedly unconstitutional minority preference in government contracting process even though it is not certain they would have received contracts in absence of preference); *Buckley v. Valeo*, 424 U.S. 1, 11-12, 116-120 (1976) (per curiam) (candidates had standing to challenge unconstitutional composition of Federal Election Commission prior to its taking action adversely affecting them). A Member who, in voting "yea" on a bill, is unconstitutionally forced to give the President the option of vetoing an item without which the Member's vote would have been "nay" is suffering an injury well within the holdings of those cases, even if it is not then certain that the President will veto the item.[11]

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[11] Moreover, contrary to appellants' suggestion, J.S. at 14 n.6, this case is plainly ripe for adjudication. The provision for expedited review, 2 U.S.C. § 692(c), eliminates all prudential ripeness concerns. *See Buckley*, 424 U.S. at 117 (statutory expedited review provision shows that "Congress was . . . concerned with obtaining a final adjudication of as many issues as possible" and eliminates prudential concerns). Indeed, waiting for the President to veto a selected item will not further clarify the constitutional issues, *see Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985), but will leave not only the Act but the vetoed item and other provisions of the same statute under a constitutional cloud. The constitutional

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This Court has recognized that individual legislators have a personal interest in their votes sufficient to give them standing to challenge actions that unconstitutionally negate those votes. In *Coleman v. Miller*, the Court held that members of a state legislature had standing to challenge a vote cast by the lieutenant governor (allegedly in violation of Article V of the U.S. Constitution) during the legislature's ratification of a federal constitutional amendment, because the lawmakers had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." 307 U.S. 433, 438 (1939).[12] The Court has since reaffirmed the validity of this holding.[13] Other courts have concurred. *See, e.g.*,

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[11] (...continued)
requirement of ripeness is satisfied because appellees' injuries are "certainly impending" and there is therefore a concrete present case or controversy. *See Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 81 (1978).

[12] Although the legislator plaintiffs in *Coleman* brought suit in Kansas state court, this Court squarely decided that they had a sufficient interest to invoke the jurisdiction of a federal court: "had the questions [raised in the suit] been solely state questions, the [issue of standing] would have ended" with the Kansas Supreme Court's declaration that the plaintiffs had a sufficient interest to sue. But because the "questions raised in the instant case arose under the Federal Constitution," the Court independently reexamined the matter to satisfy itself that the plaintiffs had "an adequate interest to invoke our jurisdiction to review." 307 U.S. at 437-38. This Court's subsequent citations to *Coleman* confirm that the case has relevance to principles of Article III standing. *See, e.g., Buckley*, 424 U.S. at 12 n.10 (1976) (citing *Coleman* for proposition that "parties with sufficient concrete interests at stake have been held to have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights"); *Baker v. Carr*, 369 U.S. 186, 208 (1962) (citing *Coleman* for proposition that individual voters have standing to challenge malapportionment of voting districts under 42 U.S.C. § 1983).

[13] *See* cases cited *supra* n. 12.

Michel v. Anderson, 14 F.3d 623, 625-26, 630 (D.C. Cir. 1994) (holding that House Members have standing to challenge committee votes given to District of Columbia and territorial delegates, and noting that Constitution specifically gives Members the right "to vote in the full House, and to be recorded"); *Barnes v. Kline*, 759 F.2d at 28 & n.15 (granting Members standing to challenge nullification of their votes by presidential pocket veto, citing *Coleman*); *Dyer v. Blair*, 390 F. Supp. 1291, 1297 n.12 (N.D. Ill. 1975) (three-judge court) (Stevens, J.) (citing *Coleman* for proposition that members of state legislature had standing to challenge state laws requiring a three-fifths majority to ratify amendments to U.S. Constitution).[14]

Coleman v. Miller makes it clear that Members have an *individual* interest in the integrity of their votes that gives them standing to challenge threatened dilutions. 307 U.S. at 438.[15] The vote is an individual right of the legislator, like his right to his seat in the legislature, *Bond v. Floyd*, 385 U.S. 116, 127 (1966), or his congressional salary, *Powell v. McCormack*, 395 U.S. 486, 496-97 (1969), even when the dispute is between the House and one of its Members. Moreover, the injury that the individual appellees suffer as a

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[14] In *Coleman*, four Justices disagreed with the Court's ruling that plaintiffs had standing but, "[u]nder the compulsion of that ruling [on standing]," participated in the Court's determination of other issues in the case and concurred in the result. *Coleman*, 307 U.S. at 456-57 (Black, J., concurring).

[15] The Court's later reading of *Coleman* in *Baker v. Carr* confirms that the legislator's interest in his or her vote is a personal one. The individual voters in *Baker* were held to have standing to sue because they asserted "'a plain, direct and adequate interest in maintaining the effectiveness of their votes,' *Coleman*, 307 U.S. at 438, not merely a claim of the right possessed by every citizen to require that the government be administered according to law." 369 U.S. at 208 (additional citation and quotation marks omitted).

result of the Act's interference with their votes is no less particularized because all 535 Members of Congress would have standing to claim it. *See Defenders of Wildlife*, 504 U.S. at 572 (recognizing that "concrete injury" can be "suffered by many persons"); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449-50 (1989) ("The fact that other citizens or groups of citizens might make the same complaint . . . does not lessen appellants' asserted injury.").

Appellee Members are affected by this change in the legal effect of their votes long before they begin voting. A Member engaged in the process of negotiating or drafting a spending or tax bill containing items he believes important must anticipate the President's unilateral power to revise the bill to eliminate those items, and tailor his strategy accordingly. Indeed, a Member now considering his vote on *any* matter in which the President has an interest (*e.g.*, other legislation, a treaty, or confirmation of a presidential appointment) must now weigh the President's power to veto an appropriation item or tax benefit of interest to that Member or his or her constituents. J.A. at 43-44, 58 (Levin Decl. ¶ 6A; Skaggs Decl. ¶ 3).

Moreover, the Act (quite deliberately) alters the process of formulating laws through legislative compromise. Prior to the Act, Members negotiating a compromise within the House or Senate on a spending or tax bill had assurance that the bill could take operative effect only in the form agreed to within that body, and that items successfully negotiated for would be preserved. Accordingly, a Member voting on final passage of a bill might accept provisions he disagreed with in order to secure passage of provisions he supported. *See* J.A. at 33-34, 43-45, 63 (Byrd Decl. ¶ 18; Levin Decl. ¶ 6; Waxman Decl. ¶ 7). But in giving the President power to upset legislative compromises by unilaterally striking items from legislation after its passage, the Act forces Members to deal with the

President in the item-by-item formulation of legislation, because he has the power to undo any compromise to which he has not agreed. *See* J.A. at 35-36, 39-40, 42-44, 58-59, 63 (Byrd Decl. ¶¶ 20-21; Hatfield Decl. ¶ 4; Levin Decl. ¶¶ 4, 6, 6A; Skaggs Decl. ¶¶ 3, 6; Waxman Decl. ¶ 7).

This disruption is a concrete, present effect of the Act, even though the item-veto power has not yet been exercised, as confirmed by the Act's proponents. *See supra* p. 7. The President's mere possession of the item-veto authority (which he has repeatedly said he would use[16]) gives him significant practical leverage over the lawmaking process.[17] As the Court has recognized, the creation of an impermissible veto authority over a decisionmaking body works a present injury because "[t]he threat of the veto hangs over the [decisionmaker] like the sword over Damocles, creating a 'here-and-now subservience' to" the officer or agency with the veto power. *Metropolitan Wash. Airports Auth. v. Citizens for the*

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[16] *See, e.g.*, 141 Cong. Rec. S8202-03 (daily ed. June 13, 1995) (containing letter from President to Speaker of the House; "Dear Mr. Speaker: I am writing to urge that Congress quickly complete work on line-item veto legislation so I can use it—this year—to curb wasteful tax and spending provisions."); Statement by the President Upon Signing S. 4 (Apr. 9, 1996). In a press conference following the district court's decision in this case, the White House confirmed that the President "fully intended to use" his item-veto power imminently. Press Release, 1997 WL 174185 at *1 (Apr. 11, 1997).

[17] The Framers recognized the sword-of-Damocles effect of the veto power. At the Constitutional Convention, James Wilson said that he "believed as others did that this [presidential veto] power would seldom be used. The Legislature would know that such a power existed, and would refrain from such laws, as it would be sure to defeat." 1 *The Records of the Federal Convention of 1787*, at 100 (Max Farrand ed. 1966) (hereinafter "Farrand"). Wilson also referred to the "silent operation" of the veto and its disciplining effect on the legislature. *Id.*

Abatement of Aircraft Noise, Inc., 501 U.S. 252, 264-65 & n.13 (1991).

Appellants argued below and in their Jurisdictional Statement that appellees lack standing because they are asserting merely "'generalized grievance[s]' plainly insusceptible of judicial resolution," J.S. at 16 (quoting *United States v. Richardson*, 418 U.S. 166, 171 (1974)). But appellees are not "claiming only harm to [their] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [them] than it does the public at large," *Defenders of Wildlife*, 504 U.S. at 573-74. Nor, more specifically, are they merely attempting to force executive compliance with legislation that they voted for (in which all citizens presumably have an interest). *Cf. Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975). The injury asserted here is an injury to appellees themselves, affecting them in the discharge of their occupational responsibilities. The D.C. Circuit has explained this distinction between a claimed injury "to [a] member['s] rights to participate and vote on legislation in a manner defined by the Constitution," which is a "specific injury" to him or her sufficient for standing, and a mere "generalized complaint that [the] legislator's effectiveness is diminished," which is not. *Moore v. House of Representatives*, 733 F.2d 946, 951 (D.C. Cir. 1984).

B. Judicial Resolution of the Constitutional Question Presented Does Not Offend the Principle of Separation of Powers.

The appellee Members have alleged concrete present injuries, affecting them in the discharge of their legislative responsibilities, that would surely be sufficient to confer Article III standing on any individual whose occupation was

anything other than "Member of Congress." Nevertheless, appellants have implied that, even if there is redressable injury, and thus a case or controversy, the fact that appellees are Members of Congress, and the activity with which this case is concerned is the passage of legislation, makes the case less justiciable than a claim of injury to a member of another occupation in his conduct of some other activity. But even if the courts should decline to adjudicate some cases brought by Members with respect to the lawmaking process on separation of powers grounds, this is not such a case.

First, Congress and the President invited the district court and this Court to decide the constitutional issue presented, and while that invitation would not make up for the lack of a case or controversy, it largely resolves the objection to courts "setting [themselves] up as arbiters of . . . internal disputes" within the political branches. *Moore*, 733 F.2d at 958 (Scalia, J., concurring). The judicial review provision of the Act is a strong statement by the political branches that Members of Congress should have the right to challenge the Act's constitutionality and that it is appropriate and desirable for the courts to resolve the constitutional issue—indeed, to do so as expeditiously as possible. Such a statement should go far toward eliminating any concern about intrusion on the other branches. *See Flast v. Cohen*, 392 U.S. 83, 131-32 (1968) (Harlan, J., dissenting) ("Any hazards to the proper allocation of authority among the three branches of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President.").

Second, nothing about the question presented makes it inherently inappropriate for judicial resolution. There is no reason to doubt, and appellants concede, J.S. at 16, that if this case had been brought by a private plaintiff challenging the veto of an appropriation item in which he had a personal interest, the Court would proceed to decide the constitutional

issue, as it did in *INS v. Chadha*, 462 U.S. 919, 935-36 (1983) ("We must also reject the contention that Chadha lacks standing because a consequence of his prevailing will advance the interests of the Executive Branch in a separation of powers dispute with Congress, rather than simply Chadha's private interests."). In addition to the fact that Congress here invited the Court's resolution of this dispute, "[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

II. THE TEXT AND STRUCTURE OF ARTICLE I FORBID CONGRESS TO GRANT THE PRESIDENT UNILATERAL POWER TO MAKE OR REPEAL A LAW, AS IT HAS DONE IN THE LINE ITEM VETO ACT.

The Constitution separates the power to make law from the power and duty to execute the law. Article I vests "[a]ll legislative Powers" in the Congress. U.S. Const. art. I, § 1. It gives the President only a qualified check on the law making process: the power to "return" (veto) a whole bill that has been presented to him, which is in turn subject to override by two-thirds of both Houses of Congress. *Id.* § 7, cl. 2. The President's constitutional role is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This separation of legislative and executive power is one of the foundations of our government, and this Court has taken important steps to preserve it. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Buckley v.*

Valeo, 424 U.S. 1, 129 (1976); *Chadha*, 462 U.S. 919; *Bowsher v. Synar*, 478 U.S. 714 (1986).

The Line Item Veto Act violates the constitutional plan. Its purpose and effect, clearly stated in its title and in its legislative history, are to give the President the power, in conjunction with signing a bill, to cause some of its provisions to be operative as law and others not, in violation of the long-established principle that, when a bill is presented to the President, he may only approve and sign or return it *in toto*. And the Act operates by giving to the President alone the power to repeal provisions of federal law, in violation of the bicameral passage and presentment requirements of Article I.

A. Article I Prescribes the Exclusive Means for Making Federal Law.

Article I sets forth a "single, finely wrought and exhaustively considered procedure" for the passage of legislation, in which the two core requirements are bicameral passage and presentment. *Chadha*, 462 U.S. at 951. Article I requires, first, that any bill making or changing federal statutory law must be passed by both Houses of Congress in exactly the same form. The Framers "provid[ed] that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses." *id.* at 948. They required bicameral passage quite deliberately, believing it would assure careful and prudent judgment in legislating. *See* The Federalist No. 22 (Hamilton), No. 51 (Madison); *Chadha*, 462 U.S. at 948-51 (*citing* 1 Farrand 254 (statement of James Wilson)).[18]

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[18] The requirement of bicameral passage was critical to the Great Compromise that enabled the Convention to agree on a Constitution. Giving the smaller states equal representation in the Senate and the

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Article I, Section 7, Clause 2 (the "Presentment Clause") then requires that every bill passed by both Houses shall be presented to the President, and it gives him exactly three choices: "[1] If he approve he shall sign it, but [2] if not he shall return it, with his Objections . . ." or [3] he may do nothing, in which case in ten days "the Same shall be a Law, in like Manner as if he had signed it, " unless the pocket veto clause applies. Unlike the House and Senate, each of which has the absolute power to block passage of a bill it disfavors, the President has only a qualified blocking power, because his veto may be overridden.[19]

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[18] (...continued)
larger states proportionate representation in the House of Representatives is a workable compromise only because both the Senate and the House must pass in the same form every bill that becomes law. *See* The Federalist Nos. 51, 62, 63 (Madison).

[19] The Constitution does not give the President any "legislative Powers" but only "a salutary check upon the legislative body," which begins after both Houses have passed a bill. The Federalist No. 73 (Hamilton). In the Pennsylvania Ratifying Convention, James Wilson denied that the Presentment Clause would give the President legislative power, stating that the language of the clause was precise: "'If he approve the bill, when it is sent, he shall sign it, but if not, he shall return it;' but no bill passes in consequence of having his assent: therefore, he possesses no legislative authority. [If the President vetoes a bill, but his veto is overridden] it becomes a law, not by his [authority], but by the authority of the two houses of the legislature." 2 *Debates* 473 (Jonathan Elliot ed. 1836).

The President's role in enacting legislation was a matter of considerable importance during the Convention. On June 4, 1787, the delegates discussed whether the President should be limited to a qualified rather than an absolute veto. 1 Farrand at 97-105. Alexander Hamilton and James Wilson proposed that the veto be absolute. Roger Sherman, however, was against "enabling any one man to stop the will of the whole." *Id.* at 99. After Benjamin Franklin explained that, with an absolute veto, "The Executive will be always increasing here, as

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The words of the Clause make it clear that the President may only approve and sign, or return, the whole bill exactly as it is presented to him. *See Field v. Clark*, 143 U.S. 649, 669-70 (1892) (There is "no authority . . . in the president to approve . . . as a legislative act, any bill not passed by congress."). This requirement has structural importance: it assures that each House of Congress has approved and passed, in exact final form, the whole of any bill that becomes law. The requirement also limits the President's power in the lawmaking process by denying him (just as the Constitution also denies the House and Senate) the power of unilateral revision of the work of the other participants. Indeed, it would be anomalous if the President, the only one of the three participants whose approval is *not* always required for a bill to become law, had the power to revise the work of the other two.

The requirement that the President sign, veto, or leave unsigned the bill as a complete whole has been clear since the beginning of the Republic: "From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto." 33 *Writings of George Washington* 96 (John C. Fitzpatrick ed. 1940). Eighteenth century explanations of the Presentment Clause are consistent with Washington's view. *See generally* 12 Op. Off. Legal Counsel 128 (1988). Later Presidents have understood that they could not approve or disapprove only parts of a bill.[20] From the time of the

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[19] (...continued)
elsewhere, till it ends in a monarchy," the state delegations voted unanimously against the absolute veto power. *Id.* at 103. The alternative of giving the President the power to suspend legislative acts temporarily was also unanimously defeated. *Id.* at 104. The qualified veto ultimately was approved, eight to two. *Id.*

[20] *See, e.g.*, 1995 Judiciary Comm. Hearings at 40 (statement of (continued...)

Framers there has been near unanimity that the President cannot sign some parts of a bill into law while rejecting other parts.[21]

B. The Line Item Veto Act Violates the Constitution's Requirements for Making, Amending, and Repealing Federal Law.

Appellants and the amici conceded below that Congress could not directly give the President the line item veto power. Def.'s Mem. Supp. Summ. J. at 13-14 (Feb. 26, 1997); Amici Mem. Supp. Constitutionality of Act at 29 (Mar. 18, 1997). They acknowledged that the Presentment Clause requires the President to act on the whole bill as presented to him. Nevertheless, the Act calls itself the "Line Item Veto Act," and its title precisely reflects its purpose: to give the President the unilateral power to determine, in conjunction with signing a bill into law, that some of its provisions will become part of the operative body of federal law while others will not. In effect, the Act does exactly the same thing as, and no more and no less than, a statute authorizing the President

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[20] (...continued)
Walter Dellinger, Assistant Attorney General); 12 Op. Off. Legal Counsel 128, 157-65 (1988) (describing the view of Presidents Washington, Grant, Hayes, Taft, Wilson, Ford and Reagan that they were required to sign or return multiple-item bills *in toto*, even though they approved some items and disapproved others); 9 Op. Off. Legal Counsel 28, 29 (1985); William Howard Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations* 11 (1916) ("[The President] has no power to veto parts of the bill and allow the rest to become a law. He must accept it or reject it, and even his rejection of it is not final unless he can find one more than one-third of one of the houses to sustain him in his veto.").

[21] *See generally Line Item Veto: The President's Constitutional Authority, Hearing on S. Res. 195 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 103rd Cong. (1994).

to veto some items in any future appropriation, spending, or tax bill at the same time he signs the remainder.

The drafters of the Act attempted to circumvent the *in toto* requirement by a mechanism that is ~~too cl~~ever by half: under the Act, the President first signs a whole appropriation, spending, or tax bill and then "cancels" the items he does not like. But postponement of cancellation until after signing has no real-world consequence whatsoever. Under the Act, the President may sign a bill and then (since the bill becomes law in that instant) sign a cancellation message and immediately transmit it, without rising from his desk, without speaking to anyone, literally in the same breath.[22] The Court should see through this "indirect attempt to accomplish what the Constitution prohibits . . . accomplishing directly." *U.S. Term Limits Inc. v. Thornton*, 115 S. Ct. 1842, 1867 (1995) (striking down congressional term limits); *see also id.* at 1868 ("To argue otherwise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded.").

We show below that the Act's "sign and then cancel" mechanism violates the Article I requirements for the repeal of legislation. Preliminarily, however, we stress that the Act deliberately contravenes the spirit and purposes of the *in toto* requirement of the Presentment Clause. It gives the President a power of unilateral revision that the *in toto* requirement was

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[22] The Act gives the President up to five days to cancel items, but this allowance of a little additional time is of no practical or constitutional significance. The stated intention was that the President cancel "as soon as possible," H.R. Conf. Rep. No. 104-491, at 22 (1996), and the five days were allowed for administrative convenience, having been reduced from the twenty days in the House-passed bill. J.A. at 68 (L.S. at 2). The significant point is that the cancellation was expected to occur in conjunction with signing, and without any intervening event or change in circumstances.

designed to deny him. The Clause does not say merely, "he shall either sign it or return it." It says, "If he approves he shall sign it but if not he shall return it . . . ." The Constitution uses this language because it expects the President to make a judgment about whether he "approves" the bill Congress wrote or "not." He need not "like" everything in a bill, but his signature is supposed to reflect his bottom-line judgment that the bill that both Houses of Congress passed should, rather than should not, become law, and his commitment to the whole law as one he will faithfully execute. The Act relieves the President of having to make that bottom-line judgment. It says to him, "You can sign a bill without judging that the bill as a whole should become law, because you can immediately strike those parts, whether 5% or 95%, that you think should *not* be the law of the land."

This violation of the spirit in which the President is supposed to sign a bill does *not* invalidate his signature. To the contrary, we have always agreed with appellants that the whole appropriation, tax, or spending bill becomes law the instant the President signs it. That is why the Act's mechanism, as well as its purpose, is unconstitutional. Congress cannot constitutionally give the President the unilateral power to repeal provisions of a federal statute. Provisions can be repealed only by the constitutional process for making law: passage by both Houses of Congress and presentment to the President.

The text of the Act makes it clear that the President has been given the unilateral power to repeal provisions of federal law. The Act uses the word "cancel" rather than "repeal," but Section 691e(4) defines "cancel" to mean "to rescind" with respect to any item of discretionary budget authority, and "to prevent . . . from having legal force or effect" with respect to items of new direct spending or limited tax benefits. All

these words mean the same thing as "repeal."[23] The words also all produce the same result: provisions that have become law are removed from the body of operative federal statutes.[24] A cancellation "terminates" a provision permanently and irretrievably, as if it had never been enacted, or as if it had been repealed by an Act of Congress. If the President later changes his mind, or reaches a different judgment based on experience, or if circumstances change so as to make some canceled spending appear desirable, he cannot revive the canceled item but must seek passage of a new law through the full Article I process. Like any other repealed provision, a

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[23] As the district court pointed out, J.S. at 25a n. 13 (quoting Webster's Third New International Dictionary 1924 (Merriam 1981)), the dictionary definition of the verb "repeal" is "1: to rescind or revoke (as a sentence or law) from operation or effect."

[24] The Conference Report makes it clear that "cancellation" permanently alters the rights of individuals, states, government contractors, and others with interests in canceled items. H.R. Conf. Rep. No. 104-491, at 29 (1996) (in different contexts cancellation negates the government's "legal obligation to pay a benefit," "eliminat[es] the increase in food stamp obligations that otherwise would occur," and "foreclose[s] the ability of the Federal Government to enter into an agreement to pay the amount of money provided in the law").

As noted above, the House-passed version of the Act, H.R. 2, used the terms "veto" and "repeal," and the related committee report confirmed that repeal was intended: "Any provision of law, as set forth in the President's special message, shall be deemed *repealed* unless a rescission/receipts disapproval bill *restoring* that provision is enacted into law." *See* L.S. at 3 (emphasis added). The distinction between a temporary suspension (deferral) and a permanent repeal (rescission) was an essential element of the ICA as enacted in 1974. Although Congress changed the word to "cancel," it rejected the Administration's urgings to change the power given to the President to one of suspension only. *See* H.R. Conf. Rep. No. 104-491, at 20 (1996); pp. 6-7 *supra*.

canceled item can become law again only through the passage of a new statute.[25]

As noted above, under the Impoundment Control Act, the President (a) has statutory authorization to defer spending items for a limited period and (b) may recommend rescissions to Congress but may not rescind items unilaterally, because Congress recognized that repeals are legislative actions that only Congress may take. The Line Item Veto Act gives the President precisely the ability to change substantive law in permanent fashion that the ICA denied him. As the district court said, "The President's cancellation of an item unilaterally effects a repeal of statutory law such that the bill he signed is not the law that will govern the Nation. That is precisely what the Presentment Clause was designed to prevent." J.S. at 21a-22a.[26]

In *Chadha*, the Court held that the power to make law can be exercised only in the manner the Constitution prescribes, including bicameral passage and presentment to the President.[27] *See also Metropolitan Wash. Airports Auth. v.*

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[25] The Act does provide for what are labeled "disapproval bills," but these are of no constitutional significance. A disapproval bill is a new statute that must go through the full constitutional process of enactment, including bicameral passage and presentment to the President. The Act provides merely that its consideration shall be expedited.

[26] The fact that a "cancellation" is a repeal is particularly clear in the case of limited tax benefits, which are statutory provisions affecting the tax liability of individuals and other taxpayers. A "cancellation" effectively removes such a provision permanently from the Internal Revenue Code, something that obviously could otherwise be accomplished only by a duly enacted law. The "limited tax benefit" provision is not severable from the Act because, as noted at p. 8, *supra*, the evidence is that Congress would not have passed the Act without it.

[27] 462 U.S. at 957. The legislative action at issue there was the effective repeal, through exercise of the one-House veto, of the statutory

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Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274 n.19 (1991) ("when Congress legislates, when it makes binding policy, it must follow the procedures prescribed in Article I") (*quoting Bowsher*, 478 U.S. at 757-59 (opinion of Stevens, J.)). The *Chadha* principle applies no less to the repeal than to the enactment of federal law. *See* 462 U.S. at 954 ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I."). The Act violates the *Chadha* principle by allowing the President alone to repeal parts of a statute without both Houses of Congress having first passed a repeal bill.

C. The Act Is an Abdication of the Power To Make Laws, Not a Delegation of Discretionary Spending Authority.

Appellants argued below and in their Jurisdictional Statement that the Act is merely a new form of delegating to the President the discretionary power to curb spending. One difficulty with this argument is that it neither explains nor saves the President's new powers to cancel entitlements and limited tax benefits. Moreover, this delegation argument cannot be limited to laws involving spending. As appellants were forced to concede at oral argument below, Transcript of Proceedings at 69-75 (Mar. 21, 1997), if Congress may give the President power to strike provisions of appropriation and direct spending statutes, there is no logical reason why he could not be given the unilateral power to make other changes in the operative body of federal law: *e.g.*, "The President may strike whatever provisions of civil rights law he considers

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[27] (...continued)
delegation of authority under which the Attorney General permitted Mr. Chadha to remain in the country.

unnecessary" or "The President may write a tax code in the public interest."

But there is a more fundamental difficulty. Appellants' argument ignores the basic constitutional distinction between the function of deciding what the law shall be and the function of carrying out Congress's instructions. *See Loving v. United States*, 116 S. Ct. 1737, 1744 (1996) ("The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity."); *Field*, 143 U.S. at 692 ("That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."). Permanently striking one or more provisions of a federal law in conjunction with its enactment, because of a determination that a particular provision should not *be* law, is a congressional and not a presidential function.[28]

The Act is not concerned merely with levels of spending. It enables the President to select, from among all the federal

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[28] Our position is fully consistent with footnote 16 in *Chadha*, cited in the Government's Jurisdictional Statement, J.S. at 24-25. There are of course many actions that "may resemble 'lawmaking'" or are "quasi-legislative" that can nevertheless properly be delegated to the Executive "subject to check by the terms of the legislation that authorized [the actions]"; then, when the Executive does take such actions, it "does not exercise 'legislative' power" because it is acting within a proper delegation. 462 U.S. at 953 n.16. Properly delegable authority "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review," *id.*, but no such review of the President's cancellations under the Act would be possible. Moreover, there are powers that are so fundamentally legislative that they may be exercised only in accordance with Article I, and the powers to strike particular provisions of bills and statutes are in this category.

activities that Congress has provided for by statute, the activities in which the Federal Government will and will not engage. The power to cancel any amount of appropriation is the power to cancel the activities that appropriation pays for: all Veterans Administration hospitals, a controversial bomber that Congress has decided should be built, Amtrak, maintaining troops in Europe, farm subsidies, enforcement of the Endangered Species Act, and so forth. Under the Act, the President can cancel the current funding for, and thereby terminate, any program or activity of the Federal Government, large or small, that depends on one or more items of appropriation, unless the congressional proponents of that activity can muster the two-thirds vote needed to override the President's veto. And he can do so for any items separately stated in a bill or separately derivable from the legislative history. 2 U.S.C. § 691e(7)(A).

The Act does not make any cancellations mandatory, nor does it tell the President how much to cut, nor how to decide among possible cuts. Congress's only instruction to the President under the Act is "Cancel any or all appropriated amounts, for whatever federal programs or activities you think should be cut, from among those that we (Congress) have enacted." The President can eliminate the maintenance of the national parks, or school lunches, or the Coast Guard, and the Act tells him nothing about how to compare their relative importance. The Act thus gives the President fundamentally legislative authority, bounded only by his own view of which previously legislated programs should continue to exist.[29] The

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[29] As appellees argued below, if the Act were tested as a delegation statute, it would be "delegation running riot." *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring); *see Panama Refining Co. v. Ryan*, 293 U.S. 388, 414 (1935). The instruction, "Save as much or as little money as you think

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district court recognized this: "Never before has Congress attempted to give away the power to shape the content of a statute of the United States, as the Act purports to do. . . . The power to 'make' the laws of the nation is the exclusive, non-delegable power of Congress which the Line Item Veto purports to alienate in part for eight years." J.S. at 25a.

The reason for this abdication of legislative power is fully set forth in the legislative history. Congress decided that it was reluctant to do its basic job of determining which federal programs and activities should exist, and decided to cede that power to the President. The Conference Report is quite candid: "The purpose of the [Act] is to promote savings by placing the onus on Congress to overturn the President's cancellations of spending and limited tax benefits." H.R. Conf. Rep. No. 104-491, at 16 (1996). Thus, under the Act, the President, not Congress, will decide which federal programs and activities are worth their cost and which are not, and if Congress disagrees with him, it will then have the "onus" of passing laws (if necessary over the President's veto) to overturn the President's policy decisions. Congress thus knew it was turning over to the President the very task of making law.

The fact that the Act is not a delegation of authority to execute the laws is further demonstrated by the requirement that the President must exercise the cancellation power, irrevocably, in conjunction with signing a statute. The usual purpose of spending discretion, where it is granted, is to give the President the ability to tailor spending to the needs of a program as revealed over time, or to circumstances as they change. The Act serves no such purpose, because its objective

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[29] (...continued)
desirable, by cutting any amounts, programs, or activities you think are not 'essential' and can be eliminated without 'harm[ing] the national interest,'" does not reflect any sort of intelligible principle.

was quite different: to give the President power to strike particular provisions from a law.

The Act differs fundamentally from the statutes in all of the delegation cases cited by appellants either to the district court or in the Jurisdictional Statement. Almost all delegation cases fall into two lines, which are the respective progeny of two early Nineteenth Century cases: *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), involving delegations to "fill up the gaps" in legislation, and *The Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813), involving express statutory direction, in the area of foreign relations, to change terms that have been set forth provisionally in the statute itself, on a finding of a specified change in conditions.

In *Wayman*, a case involving delegation to the judiciary, Chief Justice Marshall stated the general principle that still holds: "It will not be contended that Congress can delegate to the Courts . . . powers which are strictly and exclusively legislative." 23 U.S. at 42. "But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." *Id.* at 43. That is, not all of the powers actually exercised by Congress are "strictly and exclusively legislative" powers. Rather, Congress may assign to others the responsibility for making subordinate rules: "[A] general provision may be made, and power given to those who are to act under such general provisions to fill up the details." *Id.*[30]

Since that time, Congress has made many delegations to the President and to administrative agencies to "fill up the details" of general provisions of laws. Almost all of this

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[30] As then-Justice Rehnquist explained in 1980, what the delegation cases require "is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, 'fill in the blanks,' or apply the standards to particular cases." *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607, 675 (1980) (concurring opinion).

Court's delegation cases have involved such filling up of gaps.[31] When the details to be filled up in legislation are dependent on facts, it is particularly appropriate to call on the Executive, which can bring to bear both expertise and flexibility.[32]

Sometimes the gaps to be filled are particularly wide, as in the statute giving the FCC the power to grant radio licenses "if public convenience, interest, or necessity will be served thereby." 47 U.S.C. § 307(a); *see NBC v. United States*, 319 U.S. 190, 215-16 (1943). But even such delegations are constrained by the historical context and policies of the substantive statute, and do not permit the delegatee to overrule or to cancel what Congress has specifically prescribed. *See Mistretta v. United States*, 488 U.S. 361, 374-77 (1989) (describing "overarching constraints" on Sentencing Commission).

The other line of delegation cases, finding their origin in *The Brig Aurora*, involves the power to change terms that have been set forth in the statute itself, once a legislatively specified finding is made. "[I]nstead of directing another

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[31] *See, e.g., Loving v. United States*, 116 S. Ct. 1737 (1996); *Touby v. United States*, 500 U.S. 160 (1991); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Mistretta v. United States*, 488 U.S. 361 (1989); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *Lichter v. United States*, 334 U.S. 742 (1948); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Yakus v. United States*, 321 U.S. 414 (1944); *NBC v. United States*, 319 U.S. 190 (1943); *New York Central Secs. Corp. v. United States*, 287 U.S. 12 (1932).

[32] *See, e.g., Touby, supra* (Attorney General temporarily scheduled controlled substances on specified factual finding); *Lichter, supra* (in wartime, administrative officials renegotiated defense contracts on finding that profits were excessive); *Yakus, supra* (in wartime, Executive set price-ceilings after making a series of highly factual determinations); *Hope Natural Gas v. Federal Power Comm'n*, 196 F.2d 803 (4th Cir. 1952) (agency may set power rates after fact-finding).

department of government to apply a general statute to individual cases, or to supplement it by detailed regulation. Congress commands that a previously enacted statute be revived, suspended, or modified, or that a new rule be put into operation, upon the finding of certain facts by an executive or administrative officer." *The Constitution of the United States of America: Analysis and Interpretation*, Sen. Doc. No. 103-6, 76-77 (1996). Thus, in 1813, when Congress wished to impose restrictions on British shipping, but to make them contingent on certain changes in international commerce, it delegated to the President the power to determine when the restrictions would go into effect. This Court sustained that delegation: "[W]e can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct." *The Brig Aurora*, 11 U.S. at 388.

The Court's cases in this line involve matters of foreign relations, where the President's inherent powers come into play. As *United States v. Curtiss-Wright Corp.* made clear, "Congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs involved." 299 U.S. 304, 320 (1936). Similarly, *Field v. Clark*, 143 U.S. 649, (1892), and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), both upheld tariffs that could be suspended and reinstated, or raised and lowered, but not permanently changed, on the President's finding of certain facts involving commerce abroad. *Field v. Clark* specifically noted that "it is often desirable, if not essential . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations." 143 U.S. at 691.

An arguable exception to the pattern described above is *Opp Cotton Mills v. Administrator of Wage and Hour Div.*, 312 U.S. 126 (1941), which has been described as "[t]he only case in which the power of an administrative official to modify a rule enacted by Congress relating to domestic affairs has been sustained." *The Constitution of the United States of America: Analysis and Interpretation*, Senate Doc. No. 99-16, 82 (1987). But *Opp Cotton Mills* is best understood as a "fill up the gaps" case. In the Fair Labor Standards Act, Congress established a general minimum wage but delegated to an agency the authority to increase the minimum in particular industries if it made specified findings after notice and comment proceedings. Congress thus merely authorized the agency to fill in the minimum wage amounts in accordance with specified instructions, while providing a general, interim baseline itself.

The remaining delegation case cited below by appellants is the three-judge court's decision in *Synar v. United States*, 626 F. Supp. 1374, 1382-1387 (D.D.C.), *aff'd on other grounds sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986). That case involved the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985) (the Gramm-Rudman-Hollings Act). The three-judge court's opinion (this Court did not reach the issue) sustaining that act's delegation of power is instructive here. In Gramm-Rudman, Congress had made a policy choice to decrease the annual budget deficit in specified steps over a period of years and had created an automatic sequestration provision to make mandatory, across-the-board cuts in some programs, with a number of statutorily specified exceptions. The three-judge court ruled the delegation of power to sequester was constitutional because Congress had, itself, made the basic policy choices about which levels of predicted

federal spending should result in mandatory sequestration, and had spelled out the sequestration formula. The "only discretion conferred [was] in the ascertainment of facts and prediction of facts." *Synar*, 626 F. Supp. at 1389.

In contrast, the President's "cancellation" power under the Act is not the power to "fill up the details" of a legislative scheme, or to adapt a statutory program to circumstances. It is the final say in deciding whether to save money, how much to save, and which activities and programs should be terminated to do so. Instead of enabling the President to provide "assistance" to Congress without which it "cannot do its job," *Mistretta*, 488 U.S. at 372, the cancellation power enables the President to undo part of what Congress has just done. Instead of taking care that a law is faithfully executed, the President is deciding that a part of a law that he has just signed shall not be executed and shall not be law. As the district court said, "[t]he Line Item Veto Act, in contrast [to delegation cases], hands off to the President authority over fundamental legislative choices. Indeed, that is its reason for being. It spares Congress the burden of making those vexing choices of which programs to preserve and which to cut. Thus, by placing on itself the 'onus' of overriding the President's cancellations, *see* H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. at 16 (1996), Congress has turned the constitutional division of responsibilities for legislating on its head." J.S. at 27a-28a.

Finally, however broad the Congressional power to delegate to the Executive may be, it cannot possibly extend so far as to grant the line item veto authority that Article I of the Constitution, until properly amended, forbids the President to have.

CONCLUSION

This Court should affirm the decision of the district court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL.,

Appellants,

v.

ROBERT C. BYRD, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLEES

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85 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. STANDING 2

II. THE MERITS 9

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

ASARCO, Inc. v. Kadish,
490 U.S. 605 (1989) 6, 8
Babbitt v. United Farm Workers National Union,
442 U.S. 289 (1979) 4
Baker v. Carr,
369 U.S. 186 (1962) *9*
Buckley v. Valeo,
424 U.S. 1 (1976) 4, 9
Coleman v. Miller,
307 U.S. 433 (1939) 7, 8, 9
Field v. Clark,
143 U.S. 649 (1892) 16
INS v. Chadha,
462 U.S. 919 (1983) 9, 10, 11, 18
Lincoln v. Vigil,
508 U.S. 182 (1993) 13, 14
Loving v. United States,
116 S. Ct. 1737 (1996) 12
Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 6
Moore v. House of Representatives,
733 F.2d 946 (D.C. Cir. 1984) 6, 7
Powell v. McCormack,
395 U.S. 486 (1969) 6
Schlesinger v. Reservists Commission to Stop the War,
418 U.S. 208 (1974) 7
Skinner v. Mid-America Pipeline Co.,
490 U.S. 212 (1989) 17
Touby v. United States,
500 U.S. 160 (1991) 16

U.S. Term Limits, Inc. v. Thornton,
115 S. Ct. 1842 (1995) 10
Wayman v. Southard,
23 U.S. (10 Wheat) 1 (1825) 15
Wesberry v. Sanders,
376 U.S. 1 (1964) 8
Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 12

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 3 3
U.S. Const. Art. I, § 5, cl. 2 ..... 3, 4
U.S. Const. Art. I, § 7, cl. 2 19

STATUTES

2 U.S.C. §691(a) 11
2 U.S.C. §691e(1) 11
2 U.S.C. §691f(c) 11
2 U.S.C. § 691e(7) 3
Rules Enabling Act, 28 U.S.C. §2072 ..... 16, 17
Act of March 4, 1933, ch. 281, §4, 47 Stat. 1602 ... 13
Revenue and Expenditure Control Act of 1968,
Pub. L. No. 90-364, 82 Stat. 271-72 §§ 202(a),
203(a) 14
Controlled Substances Act, 21 U.S.C. § 811(h) 16
General Appropriation Act, 1951, ch. 896, §1211,
64 Stat. 65-766 (1950) 13
Omnibus Appropriations Act, 1997 Pub. L. 104-208,
110 Stat. 3009, § 101(c) 3

LEGISLATIVE MATERIALS

H.R. Conf. Rep. No. 104-491 (19196) 14, 19

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Appellees.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLEES

We showed in our opening brief that (I) appellee Members of Congress have standing to challenge the Line Item Veto Act ("Act") because (a) the Act grants them standing and (b) they have established, by unanswered declarations, that the Act inflicts on them concrete, present, individual injuries, including changing the legal effect of votes they are about to cast; and (II) the Act unconstitutionally enlarges the President's limited role in the legislative process—the power either to approve or to return a bill in its entirety, subject to override. Appellants' arguments do not answer these showings.

I. STANDING

Appellants concede that appellees' challenges to the constitutionality of the Act "are assuredly suitable for judicial resolution." Appellants' Brief at 19 (hereinafter "Br."). They contend, however, that although the Act itself authorizes Members of Congress to seek such a resolution and directs the courts to expedite decision, Members do not have standing now or ever. Appellees do not have standing now, according to appellants, because they are presently asserting only "a generalized interest in the proper application of the Constitution," *id.* at 15, or at most a merely "potential . . . frustrat[ion of their] legislative preferences," *id.* at 16. And appellants say that the appellees can never have standing as Members of Congress because Members do not and cannot have a "judicially cognizable private interest" in the exercise of their constitutional powers. *Id.* at 23. This amounts to an argument that the Act's judicial review provision itself violates Article III of the Constitution. We respond to these contentions in turn.

1. Appellants' argument that appellees have asserted only a "generalized" and "speculative" grievance simply ignores the Act's immediate impact on the legal effect of Members' votes. The district court explained the injury with an abstract example:

> [A Senator's] vote for an "A-B-C" bill might lead to the *post hoc* creation of an "A-B" law, an "A-C" law, or a "B-C" law, depending on the President's use of his newly conferred cancellation authority, for which neither he nor his colleagues would have voted so

> reconfigured. Thus, plaintiffs' votes mean something different from what they meant before . . . .

J.S. at 11a. To illustrate how the example works in practice, suppose items "A," "B," and "C," combined in a single bill, are aid to Egypt, to Jordan, and to Israel.[1] A Member of Congress might well wish to vote for the delicate balance embodied in the entire package but have strong objections to keeping any of these items if others are stricken. But the Act converts a vote for "ABC" *in toto* into a vote for a three-item menu from which the President may select any combination that he alone prefers. The Member is injured at the moment when he must cast his vote to give the President that option, regardless of what the President later does.

This is not a "speculative" injury to appellees. Each Member of Congress will, appellants concede, vote on many multi-item appropriation bills this fiscal year. It is not true that "the gravamen of [appellees'] suit is that the President will, in the future, employ [the cancellation] authority so as to frustrate the proper implementation of appropriations bills enacted by Congress." Br. at 30. Rather, appellees have asserted an injury to the meaning and legal effect of their individual votes, and this interest is expressly rooted in the Constitution. *See, e.g.*, U.S. Const. Art. I, § 3 (each Senator shall have one vote); Art. I, § 5,

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[1] In fact, the Omnibus Appropriations Act, 1997 Pub. L. 104-208, 110 Stat. 3009, § 101(c), appropriates $2,343,000,000 for certain foreign assistance purposes, "Provided, That of the funds appropriated under this heading, not less than $1,200,000,000 shall be available only for Israel, . . . Provided further, that no less than $815,000,000 shall be available only for Egypt . . . ." These two appropriations would be independently vetoable items under the Act. *See* 2 U.S.C. § 691e(7).

cl.3 (requiring recordation of Members' yeas and nays "at the Desire of one-fifth of those Present"). Appellees' claim is that the Act *now* forces appellees, when they vote, to vote for (or against) giving the President a range of choices he is not constitutionally entitled to have. It is indisputable that an ordinary citizen, alleging such a concrete injury to his legal rights, would have Article III standing. Indeed, the government does not contest that appellees have been "injured in fact," that these injuries are directly traceable to the operation of the Act, and that a declaration that the Act is unconstitutional will redress their injuries.

Appellants also make a "prudential" ripeness argument that "the Act's *practical* consequences . . . cannot be determined until the President has exercised his cancellation authority." Br. at 31. This argument is irrelevant because the Act's judicial review provision sweeps away such prudential considerations, but it is also wrong. As the district court recognized, (J.S. at 14a-15a), waiting for the President to find an unneeded museum to veto will not sharpen the constitutional issues and will only prolong the constitutional "cloud" hanging over the Act and future legislation subject to it that prompted Congress to include the judicial review provision in the first place. *See Buckley v. Valeo*, 424 U.S. 1, 113-18 (1976) (ruling on the constitutionality of the Federal Election Commission, even though it had not yet issued any decisions that adversely affected the challengers, because of an expedited judicial review provision); *see also Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979).

Although appellants contend that an actual veto is "too speculative" to satisfy Article III (Br. at 30), the President has promised to use his item veto authority promptly

(Appellees' Brief at 30 n.16 (hereinafter "Opening Br.")), and he will certainly be presented with bills containing vetoable items no later than September 30, 1997. Moreover, the individual appellees do not, by themselves, have the power to exclude spending bills from the Act, and there is no reason to think that both Houses will suddenly decide to deny the president the use of the Act after having just passed it. Finally, the inclusion of the expedited judicial review provision constitutes an implicit rejection by Congress of the notion that an item veto is too speculative to justify judicial review of the Act's constitutionality at this time.

2. Appellants argue that appellees nevertheless lack standing to complain of injury to their constitutional voting powers because they "exercise their official powers on behalf of the people" and hence they can suffer no injury in their official capacities "that is not shared by the public generally." Br. at 15. Indeed, appellants go further and argue that neither a Member nor his constituents (because their interest is too diffuse) have standing to complain of a concrete injury to the Member's voting rights. *Id.* at 23-24. Under appellants' view, Members of Congress simply have no "judicially cognizable" personal interest in their votes or the other constitutional prerogatives of their office.

On its face, appellants' sharply circumscribed view of standing is extraordinary. It means that if Representative Adam Clayton Powell had been paid his salary but denied the right to cast his vote, or the right to take his seat on the floor of the House of Representatives, he would not have

had standing to sue.[2] *But cf. Powell v. McCormack*, 395 U.S. 486, 493, 550 (1969) (defendants included House Doorkeeper, "who threatened to deny Powell admission to the House Chamber"). It means that if William Marbury had received his salary, he would not have had standing to sue for the right to hold and exercise the powers of his office. *But cf. Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 173 (1803) ("The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing.") It means that if a law provided that first-term Members were not allowed to vote on appropriations bills, or that *every* Member was disqualified on grounds of partiality from voting on major federal projects in his or her own district, no Member would be a proper Article III plaintiff.

Appellants cite no case holding that Members of Congress lack standing in such situations. Their only citation is to then-Judge Scalia's concurring opinion (but on this point, a dissent) in *Moore v. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984).[3] They attempt to

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[2] It is, of course, not necessary that a plaintiff suffer an economic injury to have standing to sue. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 616 (1989) ("Our precedents demonstrate that a party may establish standing by raising claims of noneconomic injury.").

[3] *Moore*, in which the D.C. Circuit upheld Member standing, actually presented a more difficult standing issue than that presented here. In *Moore*, Members of the House of Representatives complained that a tax law had unconstitutionally originated in the Senate. 733 F.2d at 948. No statute authorized Members to sue, and the constitutional text at issue did not purport to grant rights to individual Members, as the Constitution does with respect to members' votes. *Cf. supra* at 3-4. Upholding standing in this case does not require the Court to go as far as the D.C. Circuit did in *Moore*: the Court need only decide that Members

(continued...)

bolster their position by arguing that (a) "citizens are the ultimate beneficiaries of [the Presentment Clause] provisions" (Br. at 23, quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)); (b) citizens would not have standing merely because they are ultimate beneficiaries (*id.* at 23-24); and therefore, (c) Members (who in their official capacities are the *direct* beneficiaries of the Clause) do not have standing either. *Id.* But this argument is a *non sequitur*. There are many cases where persons who suffer the immediate impact of a legal wrong are the logical and constitutionally proper plaintiffs even though the "ultimate beneficiaries" of the right in question cannot sue. For example, trustees sue where their beneficiaries would historically have been barred from the law courts and today are barred by the terms of a trust indenture.

In the specific context of legislative voting, the Court has held that legislators "have a plain, direct and adequate interest in maintaining the effectiveness of their votes" sufficient to enable them to proceed in a federal court. *Coleman v. Miller*, 307 U.S. 433, 438 (1939). Appellants labor to distinguish *Coleman* on the ground that the legislator plaintiffs in *Coleman* brought suit in state court and were in this Court only on a petition for certiorari to

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[3] (...continued)
of Congress have standing to sue where (a) they allege an injury involving interference with their lawmaking responsibilities, (b) Congress has explicitly authorized them to sue as part of the statute that forms the basis of their claim, and (c) the claim itself is plainly justiciable. Upholding standing in these circumstances does not involve courts "setting [themselves] up as arbiters of . . . internal dispute[s]" among the political branches, or deciding questions that should be left to those branches. *Moore*, 733 F.2d at 958 (opinion of Scalia, J.).

review a state court judgment. *See* Br. at 28-29 n.15. But *Coleman*'s holding cannot be limited to cases concerning the Court's appellate jurisdiction. The *Coleman* plaintiffs had *lost* in the state courts and were renewing their federal claims in this Court. They were the parties "attempting to invoke the federal judicial power" and "seek[ing] entry to the federal courts for the first time in the lawsuit." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 618 (1989). As the Court explained in *ASARCO*, the Court has jurisdiction to review a state court decision only where, in addition to a federal question, there is a case or controversy *and* the parties who bring the case to federal court—the legislators in *Coleman*—claim a "distinct and palpable" injury sufficient to give them "standing to invoke the authority of a federal court." *Id* (citation omitted). If the *Coleman* plaintiffs had lacked Article III standing to proceed in a federal district court, this Court would have lacked jurisdiction to review the state court's decision at their behest.

Appellees' other attempts to distinguish *Coleman* are equally unavailing. The interest of a Member of Congress in his vote is no less "concrete and palpable" than that of a state legislator. *Cf. Wesberry v. Sanders*, 376 U.S. 1 (1964) (federal voters, like state voters, have standing to protect their votes against dilution through malapportionment). Appellants also note that federal separation of powers principles "are not binding upon the states." Br. at 29 n.15. But the important point is that in this case the statutory judicial review provision, the concreteness of the injury, and the conceded fitness of the question for judicial resolution remove any separation of powers concern.

Finally, this Court's own reading of *Coleman* is that the Court there recognized that legislators have an interest in their own votes sufficient to give them Article III standing. In *Baker v. Carr*, for example, the Court cited *Coleman* for the proposition that individuals have standing because they have an interest "in maintaining the effectiveness of their votes . . . [and] not merely a claim of the right possessed by every citizen to require that the government be administered according to law." 369 U.S. 186, 208 (1962) (citations and quotation marks omitted). *See also Buckley v. Valeo*, 424 U.S. 1, 12 n.10 (1976).[4]

II. THE MERITS

1. Appellants acknowledge that "a hypothetical statute conferring true item veto (*i.e.*, partial "return") authority," (Br. at 36), would violate Article I's requirement that "the President . . . sign or return, *in toto*, a bill presented to him by Congress . . . ." Br. at 34. The sole purpose of the Act, as its title frankly proclaims, is to evade this constitutional constraint, and appellants admit that there is no significant difference between the "practical effect" of the Act's sign-and-then-cancel procedure and a "true item veto." Br. at

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[4] Appellants' explication of the law governing suits on behalf of the government or on behalf of Congress as an institution (Br. at 25-29) is irrelevant. Appellees are not invoking the jurisdiction of the federal courts as representatives of the United States or of the Congress as a whole. They seek to vindicate a right that the Constitution gives them individually in their capacity as Members. *See INS v. Chadha*, 462 U.S. 919, 935-36 (1983) ("We must also reject the contention that Chadha lacks standing because a consequence of his prevailing will advance the interests of the Executive Branch in a separation of powers dispute with Congress, rather than simply Chadha's private interests.").

36. The parties to this case thus agree that the Act was deliberately designed by Congress to accomplish two objectives: to comply with the procedural formalities of Article I, and to defeat the very purpose of those formalities. Because the Constitution condemns "indirect attempt[s] to accomplish what the Constitution prohibits [Congress] from accomplishing directly," *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1867 (1995), the Act violates the fundamental constitutional requirement that the President either approve a bill or return it in its entirety.

2. Although appellants recognize that "[t]he legislative steps outlined in Art. I are not empty formalities," (Br. at 36), quoting *Chadha*, 462 U.S. at 958 n. 22, they nonetheless argue that the requirements of the Presentment Clause are strictly procedural and are satisfied the moment an appropriations act is signed, regardless of what is "canceled" the following moment. But even if appellants are correct—that is, even if "the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded," *U.S. Term Limits*, 115 S. Ct. at 1868—the Act is still unconstitutional, for it grants to the President the power to make law (or, more precisely, to *unmake* law) in violation of the "single, finely wrought and exhaustively considered, procedure" mandated by Article I. *Chadha*, 462 U.S. at 951. As demonstrated at length in our opening brief, once an item is canceled under the Act, it is extinguished. It is no longer law, and neither the President who canceled the provision nor any successor President can exercise the authority that the provision, before its cancellation, had granted. It can be restored to the status of law only if it is reenacted according to the procedure prescribed by Article I. Thus, the power to "cancel" a duly

enacted spending or tax code provision is the power to *repeal* the provision, plain and simple. And "repeal of statutes, no less than enactment, must conform with Art. I." *Id.* at 954.

Appellants, however, argue that the Act merely grants discretion to the President to determine "whether items of spending that Congress has authorized will in fact be spent." Br. at 37. The Act should therefore be tested, appellants say, according to the rules applicable to the President's execution of the laws under Article II, rather than the finely wrought procedures for lawmaking under Article I.

The cancellation power granted under the Act, however, is not a "discretionary" or "executive" power at all. The President is not given any power to fill in interstices of spending or tax measures, or to reduce or reallocate spending based on experience, assessments of program costs, familiarity with aspects of implementation of a program, or changes in circumstances over time. Appellants argue that the Act merely sets a new "default rule," meaning that it makes all spending discretionary unless expressly designated as mandatory. This argument fails because the Act does not grant the President any form of executive discretion under Article II to tailor spending during the life of an authorization, but grants him only the Article I legislative power to strike authorizations (and entitlements and certain tax benefits) at the time of enactment. Indeed, the Act empowers the President to cancel items only if he has signed a bill into law, but not if the law has been enacted over his veto or without his signature. *See* 2 U.S.C. §§ 691(a), 691e(1), 691f(c). If Congress had intended to confer cost-cutting discretion in

"executing" spending legislation, it would not matter how such a bill became law.

In short, the power that Congress intended to, and did, give the President in the Act is not Article II discretion in executing the provisions of spending legislation, but rather is Article I power to extinguish provisions in such legislation. The Act is therefore at war with the basic and undisputed principle that Congress may not convey its Article I lawmaking power to the President or expand his Article I veto power unless and until the Constitution is so amended.[5]

3. None of appellants' examples of grants of spending (or other) discretion resembles the Act's transfer of legislative power to the Executive.

a. Appellants rely heavily on the fact that Congresses, including the First Congress, have enacted many statutes appropriating "sums not exceeding" specified amounts, allowing the President to spend less than the ceiling, and sometimes to allocate the allowed amount as the President sees fit among authorized activities. All such statutes differ fundamentally from the Act.

First, a "sums not exceeding" statute grants the President or an agency head a true discretion in the execution of the spending measure under Article II. He can determine, over the appropriation period, what sums are needed for the purpose specified in the statute. Under some

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[5] *See, e.g., Loving v. United States*, 116 S. Ct. 1737, 1744 (1996) ("[T]he lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

of the statutes cited by appellants, he may decline to spend amounts "that may not be needed for the purposes for which appropriated." Act of March 4, 1933, ch. 281, § 4, 47 Stat. 1602 (Br. at 5). Other cited "sums not exceeding" measures permit the President to "provide for contingencies, or . . . effect savings wherever savings are made possible by or through changes in requirements, greater efficiency of operations, or other [post-enactment] developments." General Appropriation Act, 1951, ch. 896, § 1211, 64 Stat. 765-66 (1950) (Br. at 5). Similar statutes permit the President or an agency to "adapt to changing circumstances." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (Br. at 3). The spending discretion granted under such statutes can be exercised by the President at any time during the appropriation period, and an exercise of the granted discretion does not disturb, let alone extinguish, the underlying appropriation law. On the contrary, the law remains in effect, authorizing the further exercise of presidential discretion in executing its provisions. Indeed, the President (or his successor) retains discretion throughout the appropriation period to reverse a prior decision in light of new information, further experience, or reordered priorities.

The Act, in contrast, grants no proper Article II discretion. It authorizes the President only to strike the appropriation (or entitlement or tax provision) itself, permanently, at its birth. And if the President (or his successor) later decides as Chief Executive that "contingencies," or "changes in requirements," or new "developments" warrant spending a previously canceled item, he is powerless to revive it, because his cancellation extinguished the appropriation law itself.

Second, while there has been some variation in the kinds of authority granted, appropriation statutes phrased in "ceiling" terms nevertheless reflect the expectation that the President *will* take care that the programs and activities provided for by law are faithfully carried out. *E.g.*, *Lincoln*, 508 U.S. at 192 (lump-sum appropriation to agency gives it discretion to "meet its statutory responsibilities in what it sees as the most effective or desirable way" by distributing its funds "among some or all of the permissible objects"). The Act, by contrast, is a transfer of power not merely to reduce expenditures, nor to meet statutory responsibilities in the most effective way, but to "surgically terminate" (H.R. Conf. Rep. No. 104-491 at 20 (1996)), at the time the President signs the bill, the programs and activities that those appropriation items would fund (and entitlements and tax benefits to which private citizens are statutorily entitled).

Appellants cite §§ 202(a) and 203(a) of the Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, 82 Stat. 271-72 as comparable authority to the Line Item Veto Act. Br. at 6. Those sections, apparently enacted prior to the passage of the fiscal 1969 appropriations acts, did set spending ceilings, subject to specified exceptions, and the President would have had to make reductions to meet those ceilings if the estimates set forth in his budget were enacted. But appellants cite no authority to show that the appropriations acts that Congress did pass in fiscal 1969 exceeded those ceilings, or that anyone considered whether allowing the President to act in that manner was constitutional. In any event, if the threshold for such reductions was reached, the President was *required* to make them, whereas under the Line Item Veto Act he is free to

cancel whatever amounts he chooses—or to cancel nothing at all. Furthermore, there was neither a time limit tied to the bill's enactment for making reductions, nor was the President prevented from changing his reductions after his initial decision. And, contrary to appellants' assertion (*id.*), the appropriations acts for fiscal years 1970 and 1971 did not contain any mandatory reductions, but simply allowed the President to increase the ceilings, up to fixed amounts, if certain limited categories of expenditures or receipts exceeded the targeted levels.

b. Almost all of the remaining examples cited by appellants involve delegations of interstitial power under Article II. In some cases, it is the power, in Chief Justice Marshall's phrase, to "fill up the details." *See Wayman v. Southard*, 23 U.S. (10 Wheat) 1 (1825); Opening Br. at 46-47. In some of these cases, the executive discretion granted has been broad, but the executive or agency discretion has always been constrained by the policies of the substantive statute and subject to judicial review for conformity therewith. *See* Opening Br. at 47. In a few cases, almost always involving foreign affairs, the power has been phrased as a power to turn a statutory provision on or off, but in each case the trigger for doing so has been the occurrence of a statutorily specified event which the President determines to have happened. *See id.* at 47-49. As the district court noted, such statutes are examples of Congress "'legislating in contingency'; that is, where Congress itself determines in advance when conditions yet to occur should cause the law to cease to be operative. The President is merely the instrument of its will." J.S. at 27a. None of these statutes resembles the Act's grant of power, over eight years, to make irrevocable determinations at the

times of enactment of a wide range of statutes, that some of their provisions should not be part of operative federal law.

The statute in *Field v. Clark*, 143 U.S. 649, 692 (1892), for example, instructed the President to impose certain tariffs on specified conditions. In sustaining the statute, the Court noted that once the President found that the specified conditions had been met, "it became his duty" to impose the tariffs. *Id.* The President was the "mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." *Id.* at 693. The Court, as we have previously noted, explicitly recognized that Congress cannot "invest the President with the power of legislation." *Id.* at 692.

Appellants also cite *Touby v. United States*, 500 U.S. 160 (1991), holding that Congress may delegate authority to the Attorney General to add substances to statutory schedules under the Controlled Substances Act, 21 U.S.C. § 811(h), on an emergency basis. But there was a statutory standard for such additions ("imminent hazard to public safety"), and the Court upheld the statute only after finding that the defendant had the right to judicial review, *see* 500 U.S. at 168, the clearest possible indication that Congress had granted only interstitial Article II discretion bounded by statutory requirements. Again, that power to respond to changing circumstances over time is nothing like the President's essentially unbounded, and certainly unreviewable, one-time and irreversible Article I power under the Line Item Veto Act to strike provisions of future appropriation, entitlement, and tax laws at the time he signs them.

Appellants cite the Rules Enabling Act, 28 U.S.C. § 2072 ("REA"), which empowers this Court to prescribe

rules of procedure for the lower federal courts and provides that such rules supersede prior conflicting laws. Br. at 49. There Congress decided to assure that all former rules of practice, procedure, and evidence for the federal courts be replaced by the new uniform system that this Court would promulgate. But the REA has no bearing on the question whether the Act unconstitutionally expands the President's powers under Article I or merely delegates executive authority under Article II. The REA concerns the very different relationship between Congress and this Court in writing rules for lower federal courts established under Article III, and in any event, the constitutional questions presented by the REA have never been adjudicated.

4. Acceptance of appellants' delegation argument has enormous implications, as the district court recognized. J.S. 26a. The power claimed here cannot be confined to legislation relating to the amount of federal spending or revenues, but rather could include the power to eliminate substantive provisions, such as entitlement authorizations, as well. In fact, as noted above, the Act allows the President to cancel the funding of whatever discretionary or new programs he chooses, with decidedly substantive effects on the beneficiaries of such programs. If, as Appellants urge, the Constitution permits Congress to delegate to the President the Article II power to cancel appropriations and tax preferences, it would permit similar delegations in every other substantive area. *See Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989). There would thus be no constitutional basis to preclude Congress from giving the President the power to cancel substantive conditions and restrictions—"fencing language"—imposed in spending or tax bills. Indeed, under appellants' theory of delegation,

there is no reason the President could not be given similar power over substantive areas of law that have little or no spending implications, such as civil rights, regulation of health and the environment, or the federal criminal code.

Similarly, there is no reason the cancellation power must be limited to *new* direct spending and tax laws. Appellants do not contend that the Act's five-day window in which the President must cancel items is a constitutional rather than a merely statutory limitation. Thus, if it is constitutional to grant the President the power to cancel an entitlement-creating provision that was signed five days earlier, there would be no constitutional impediment to his canceling similar provisions enacted at any previous time, by any previous Congress.

5. There is a final reason the Act is not a delegation of discretion in the execution of spending and tax measures. "Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review . . . ." *Chadha*, 462 U.S. at 953 n.16. The Act makes no serious pretense of providing any such "check," precisely because it does not purport to confer any sort of executive discretion under Article II, but rather gives the President a new role in the lawmaking process under Article I. Thus, the absence of standards further demonstrates that the Act is an attempt to restructure the Article I lawmaking process and not a delegation of executive power at all.[6]

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[6] Indeed, if the Act were tested under the nondelegation doctrine, it would surely fail because of this absence of standards. We respectfully suggest that if this Act can survive scrutiny under this Court's nondelegation doctrine, there is nothing left of the doctrine at all.

The Act requires the President to make three determinations, but none of them does any more than ask the President to make the same determination that he makes in vetoing any measure, without either congressional guidance or any possibility of review. He is simply doing, on a line by line basis, what Hamilton (The Federalist No. 73) said the President would do with the more limited power to veto a whole bill: "preventing [what he thinks are] bad laws." *See* H.R. Conf. Rep. No. 104-491 at 15 (1996).

Similarly, the requirements that he cancel an item within five days after signing a bill, and cancel only whole items, simply reflect the intention to give him an item veto in the legislative process; they do not give him "significant guidance" (Br. at 44) on how much to cancel or in which programs. The requirement that he "consider the legislative history, construction, and purposes of the law" appears to relate only to the identification of what is an "item," and in any event is not a meaningful constraint. The requirement that he articulate the reasons for his decision only mirrors the constitutional requirement that when the President "returns" a bill he shall do so "with his Objections." U.S. Const., Art. I, sec. 7, cl. 2. Although appellants suggest (Br. at 45) that this requirement "provides an additional safeguard against arbitrary action," they do not suggest that the President's item veto choices can be judicially reviewed, nor do they explain in what sense the President's choices could *be* improperly "arbitrary." The whole idea is to allow him to make whatever spending or tax choices he wishes at the very time he signs a bill into law. That is a power Congress cannot give him under the Constitution as it now stands.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, this Court should affirm the decision of the district court.

Respectfully submitted,

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FRANKLIN D. RAINES, ET AL., APPELLANTS

v.

ROBERT C. BYRD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

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TABLE OF AUTHORITIES

Cases:

Alaska Airlines, Inc. v. *Brock*, 480 U.S. 678 (1987) 20
Allen v. *Wright*, 468 U.S. 737 (1984) 4
Bender v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) 1, 2
Bengzon v. *Secretary of Justice*, 299 U.S. 410 (1937) 13
Bennett v. *Spear*, 117 S. Ct. 1154 (1997) 3
Bowles v. *Willingham*, 321 U.S. 503 (1944) 14
Bowsher v. *Synar*, 478 U.S. 714 (1986) 3
Buckley v. *Valeo*, 424 U.S. 1 (1976) 20
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 15
Chicago & Grand Trunk Ry. v. *Wellman*, 143 U.S. 339 (1892) 4
Cincinnati Soap Co. v. *United States*, 301 U.S. 308 (1937) 15
Coleman v. *Miller*, 307 U.S. 433 (1939) 8
Field v. *Clark*, 143 U.S. 649 (1892) 17, 19
Flast v. *Cohen*, 392 U.S. 83 (1968) 4
Goldwater v. *Carter*, 444 U.S. 996 (1979) 4
INS v. *Chadha*, 462 U.S. 919 (1983) 12
Intermountain Rate Cases, 234 U.S. 476 (1914) 17
J.W. Hampton, Jr. & Co. v. *United States*, 276 U.S. 394 (1928) 19
Loving v. *United States*, 116 S. Ct. 1737 (1996) 15, 17
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 2
Mistretta v. *United States*, 488 U.S. 361 (1989) ... 14, 15
Moore v. *U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985) 1
Muskrat v. *United States*, 219 U.S. 346 (1911) 3
OPM v. *Richmond*, 496 U.S. 414 (1990) 10

Cases—Continued: Page

Reeside v. *Walker*, 52 U.S. (11 How.) 271 (1851) 10
Simon v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976) 9
Skaggs v. *Carle*, 110 F.3d 831 (D.C. Cir. 1997) 7
Skinner v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989) 19
Touby v. *United States*, 500 U.S. 160 (1991) 18
Train v. *City of New York*, 420 U.S. 35 (1975) 5
United States v. *Richardson*, 418 U.S. 166 (1974) 4
United States v. *Will*, 449 U.S. 200 (1980) 1
Valley Forge Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 3-4
Yakus v. *United States*, 321 U.S. 414 (1944) 15

Constitution and statutes:

U.S. Const.:
Art. I 15, 17
§ 7, Cl. 2 (Presentment Clause) 11
§ 9, Cl. 7 (Appropriations Clause) 10
Art. II 17
§ 2, Cl. 1 16
Art. III 1, 2, 3, 9
Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251, 31 U.S.C. 1341) 10
Act of June 10, 1933, ch. 55, § 1, 48 Stat. 119 19
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 7
Agricultural Adjustment Act, 7 U.S.C. 601 *et seq.* 18
7 U.S.C. 613 18
Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 16

Statutes—Continued: Page

Defense Production Act of 1950, 50 U.S.C. App. 2061 *et seq.* 18
50 U.S.C. App. 2166(b)(1) 18
Impoundment Control Act of 1974, Pub. L. No. 93-344, Tit. X, 88 Stat. 332 (2 U.S.C. 681 *et seq.*):
§ 1021(a)(A), 2 U.S.C. 691(a)(A) 11
§ 1021(a)(A)(i), 2 U.S.C. 691(a)(A)(i) 11
§ 1021(a)(B), 2 U.S.C. 691(a)(B) 11
§ 1021(a)(3), 2 U.S.C. 691(a)(3) 19
§ 1021(b), 2 U.S.C. 691(b) 11
§ 1022(b), 2 U.S.C. 691a(b) 11
§ 1023(b), 2 U.S.C. 691b(b) 10
§ 1024, 2 U.S.C. 691c 10
§ 1026(8), 2 U.S.C. 691e(8) 10
§ 1026(9)(A), 2 U.S.C. 691e(9)(A) 19
Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (to be codified at 2 U.S.C. 691 *et seq.*):
§ 3(a)(1), 110 Stat. 1211 (2 U.S.C. 692(a)(1)) 3
1 U.S.C. 1-6 7
1 U.S.C. 108 7
1 U.S.C. 109 7
5 U.S.C. 302(b) 7
21 U.S.C. 811(a)(1)-(2) 18
21 U.S.C. 812 18
22 U.S.C. 1965 18
31 U.S.C. 1301(c) 7
31 U.S.C. 1301(d) 7

Miscellaneous:

The Federalist No. 72 (Rossiter ed. 1961) (Hamilton) 16
Speech of the Honourable John Marshall to the House of Representatives, 18 U.S. (5 Wheat.) App. 3 3

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REPLY BRIEF FOR THE APPELLANTS

A. 1. Contrary to appellees' suggestion (Br. 31), we do not contend that an individual's status as a Member of Congress imposes special limitations on his entitlement to judicial relief. A Member who establishes a cognizable personal (*e.g.*, pecuniary) interest in the resolution of a legal issue has standing to sue, even if the opposing party is another governmental official or entity. See Gov't Br. 22 n.11; *Moore* v. *U.S. House of Representatives*, 733 F.2d 946, 960 n.2 (D.C. Cir. 1984) (Scalia, J., concurring in result), cert. denied, 469 U.S. 1106 (1985); cf. *United States* v. *Will*, 449 U.S. 200 (1980) (suit by Article III judges challenging statutes affecting their compensation).[1]

[1] Nor is there any basis for appellees' assertions (Br. 18, 31-32) that persons other than Members of Congress would have standing to sue in analogous circumstances. In *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 543-545 & n.6 (1986), this Court held that an individual school board member lacked standing to appeal from a district

This Court's cases make clear, however, that separation-of-powers principles are directly relevant to the question whether the harms alleged by appellees may be regarded as legally cognizable injuries. In *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 576 (1992), the Court rejected the proposition that "the public interest in proper administration of the laws * * * can be converted into an individual right by a statute that denominates it as such." The Court explained:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3.

Id. at 577. A statute that defined Executive Branch noncompliance with the Constitution and laws as a judicially cognizable injury to Congress or its Members would be

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court judgment entered against the board. Despite the fact that the district court had declared a decision of the board to be unconstitutional, see *id.* at 537-539, the Court concluded that the member "ha[d] no personal stake in the outcome of the litigation," *id.* at 543-544. *Bender* cannot be reconciled with appellees' contention (Br. 18) that "members of any other occupation" would have standing to challenge "a statute [that] unconstitutionally altered the legal consequences of a core occupational activity." To the contrary, *Bender* makes clear that an individual whose "core occupational activity" is participation in a *collective* decision-making process typically lacks a judicially cognizable interest in vindicating the decision of the body as a whole. In any event, appellees do not have just "any other occupation." They sue as Members of one Branch of a Government established by a Constitution that rests on a system of separated powers in order to secure personal liberty (see Gov't Br. 24) and prescribes a limited role for Article III courts in their relation to the political Branches.

subject to even more pressing constitutional objections.[2] Such a statute would not only expand the role of the courts beyond their proper sphere; it would vest Congress with a substantial institutional role in the execution of the laws, in violation of fundamental separation-of-powers principles. See, *e.g.*, *Bowsher* v. *Synar*, 478 U.S. 714, 733 (1986) ("once Congress makes its choice in enacting legislation, its participation ends"); Gov't Br. 25-26.

Indeed, this suit is far removed from an exercise of the "judicial Power" and the resolution of "Cases" and "Controversies" as the Framers understood those terms. See, *e.g.*, Speech of the Honourable John Marshall to the House of Representatives, 18 U.S. (5 Wheat.) App. 3, 16 ("A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution * * * the other departments would be swallowed up by the judiciary."); *Muskrat* v. *United States*, 219 U.S. 346, 356-357 (1911). Appellees seek a ruling by an Article III court, not as a forum of "last resort," *Valley Forge Christian College* v. *Americans United for Sepa-*

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[2] Section 3(a)(1) of the Line Item Veto Act authorizes suits by Members of Congress challenging the constitutionality of any provision of the Act. J.S. App. 56a (2 U.S.C. 692(a)(1)). Contrary to appellees' contention (Br. 32), Section 3(a)(1) does not reflect an affirmative congressional determination that individual Members have Article III standing to challenge the Act. Rather, it is properly understood as eliminating prudential barriers to Members' suits. In *Bennett* v. *Spear*, 117 S. Ct. 1154 (1997), this Court considered a statutory provision authorizing "any person" to bring suit to enforce the Endangered Species Act. In considering whether the plaintiffs had standing under Article III, the Court did not give weight to any supposed congressional determination that *all* persons would have standing to sue. The Court instead construed the citizen-suit provision to expand standing to the full extent permitted by Article III. See *id.* at 1162-1163.

ration of Church & State, Inc., 454 U.S. 464, 471 (1982) (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)), for redress of personal injuries, but rather as a sort of council of revision within the Government to nullify an Act of Congress before it has any operative effect—a mechanism specifically rejected by the Framers. See *United States* v. *Richardson*, 418 U.S. 166, 189-191 n.9 (1974) (Powell, J., concurring); Gov't Br. 32-33. And a dispute solely between the political Branches is not one whose "adjudication is consistent with the system of separated powers" or "traditionally thought to be capable of resolution through the judicial process." *Allen* v. *Wright*, 468 U.S. 737, 752 (1984) (internal quotation marks omitted) (quoting *Flast* v. *Cohen*, 392 U.S. 83, 97 (1968)). Compare *Goldwater* v. *Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in the judgment) ("we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum").

2. Appellees deny that they are "merely attempting to force executive compliance with legislation that they voted for (in which all citizens presumably have an interest)," claiming instead to have "alleged specific injuries to themselves in the exercise of a power that is positively identified by Article I of the Constitution: the power to vote on the final passage of legislation." Appellee Br. 31, 24. The Line Item Veto Act, however, places no constraints on the right of appellees to vote on proposed legislation. Nor does the Act affect the manner in which votes are counted. Despite their efforts to gainsay the fact, appellees' suit is in every meaningful respect an attack on the manner in which future appropriations laws will be implemented *after* they are enacted.

That would be true, we emphasize, even if (as appellees contend) a cancellation under the Act constituted an impermissible partial "repeal" of an appropriations law. In that event, the President's refusal to spend the appropriated funds would violate his obligation to execute the particular appropriations law in accordance with its terms. The same would be true, however, if the President refused to spend funds based on the mistaken belief that the underlying appropriations law was permissive rather than mandatory. See *Train* v. *City of New York*, 420 U.S. 35 (1975); Gov't Br. 6-7. In either circumstance, the President's unlawful failure to spend the appropriated funds would be subject to challenge by a plaintiff whose pecuniary interests were adversely affected (see Gov't Br. 19-20); but neither form of Executive Branch illegality would threaten appellees' right to vote or otherwise impair their ability to discharge their legislative duties.

Appellees assert (Br. 24) that the Line Item Veto Act "changes the legal effect of Members' votes on spending and tax bills" and "deprives them of their right, as individual Members, to vote on every bill in the exact final form in which it *becomes operative as law*" (emphasis added). The precise meaning of the italicized language is left unclear. Appellees plainly do *not* contend, however, that cancellation under the Act causes appropriations laws to be *enacted* in any form other than that in which they were voted on by Congress. They acknowledge (Br. 39) that "the whole appropriation, tax, or spending bill becomes law the instant the President signs it." In stating that the appropriations bill may "become[] operative as law" in some form other than that in which it was voted on, appellees can only mean that the President's cancellation would deprive the bill, *after enactment*, of its operative effect. That contention (whatever its merits) has nothing to do with the lawmaking process; it is simply a challenge

to the (anticipated) execution of (hypothetical) enacted laws.[3]

3. Appellees also contend that the Line Item Veto Act injures them even in advance of any actual cancellation. They assert that the Act "unconstitutionally increases the President's power" by enabling him to utilize the threat of cancellation "to influence Member votes on all matters before Congress." Appellee Br. 24. The Act, however, places no legal constraints on Congress's ability to require the President to spend appropriated funds on specified projects, since Congress retains the power to provide that the Act shall not apply to a particular appropriations law, or to any individual item contained therein. See Gov't Br. 30-31. Appellees (and other individual Members) may attempt to persuade their colleagues to vote to exempt particular appropriations laws, or individual budgetary items, from the cancellation authority vested in the President by the Line Item Veto Act.[4]

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[3] If appellees' arguments were accepted, *any* contention that *any* Executive Branch officer's conduct violates statutory requirements or prohibitions could be recast as a claim that a Member's vote had been nullified or its legal effect altered, or that the statute in question had "become operative as law" in some manner other than that in which it was voted on. If separation-of-powers principles bar Congress from defining noncompliance with federal law as an injury to itself or its Members, that bar cannot be circumvented by recharacterizing such noncompliance as an impairment of the Members' right to vote.

[4] The district court stated that "just because Congress *as a whole* can suspend or repeal the Act, or pass a disapproval bill, does not mean that an *individual* Member's injury is illusory. A Member cannot procure any such relief on his own." J.S. App. 15a. An individual Member's achievement of *any* legislative goal, however, requires the support of a majority of his colleagues. Appellees' inability to effectuate legislative policy unilaterally is neither the result of the Line Item Veto Act nor a judicially cognizable injury.

The Line Item Veto Act simply provides that future appropriations laws will be permissive rather than mandatory unless those future laws state otherwise.[5] Any change in the negotiating process between Congress and the President will result not from the legal force of the Act, but from the (actual or anticipated) unwillingness of other Members of Congress to exempt particular appropriations laws from the Act's coverage. That prospect is insufficient to establish judicially cognizable injury. Cf. *Skaggs* v. *Carle*, 110 F.3d 831, 834-836 (D.C. Cir. 1997) (Members of Congress lacked standing to challenge House Rule requiring three-fifths vote for passage of any federal tax rate increase, since a simple majority could amend or repeal the Rule, or suspend its operation with respect to a particular tax increase).[6]

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[5] Taken in isolation, the Line Item Veto Act has no operative legal effect. The Act is similar, in this respect, to various federal statutory provisions—including other provisions of the Impoundment Control Act—whose sole function is to regulate the construction or implementation of *other* federal laws. See, *e.g.*, 1 U.S.C. 1-6 (Dictionary Act); 1 U.S.C. 108, 109 (effect of statutory repeals); 5 U.S.C. 302(b) (powers vested by law in agency head may be delegated to subordinate officials); 5 U.S.C. 701 *et seq.* (judicial review of agency action); 31 U.S.C. 1301(c) and (d) (rules governing construction of appropriations laws).

[6] In pointing out that the Line Item Veto Act's provisions may be rendered inapplicable to any appropriations law or item contained therein, we do not intend to trivialize the Act's significance. Having chosen (after extensive deliberation and debate) to enact the Line Item Veto Act, Congress may be unlikely to adopt a routine practice of exempting individual appropriations laws from its coverage. The fact remains, however, that the Act can have no effect unless Congress passes *another* law that is not exempted from the Act's terms. The Act's practical effect thus depends entirely on Congress's *continued* adherence to the view that the budgetary discretion it confers on the President represents wise national policy. And even then, the Act will

Appellees' claim that the Act injures them by increasing the President's power during negotiations is flawed in other respects as well. As we explain in our opening brief (at 22-25), Members of Congress exercise their powers on behalf of their constituents and of the public generally, and they have no personal interest in the allocation of power between the Legislative and Executive Branches.[7] Appellees are in an especially poor position to represent the interests of the Legislative Branch, since they challenge the constitutionality of an Act of Congress that has been defended in the district court and this Court by the Senate and House of Representatives as *amici curiae*. And it is implausible to suppose that the *threat* of cancellation could inflict a judicially cognizable injury upon appellees if (as we demonstrate above, see pages 4-6, *supra*) an *actual* cancellation would not.

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have no concrete legal effect unless and until the President exercises his cancellation authority with respect to a particular item.

[7] Appellees' contrary argument is premised almost exclusively (see Appellee Br. 27-28) on *Coleman* v. *Miller*, 307 U.S. 433 (1939). As we explain in our opening brief (at 28-29 n.15), *Coleman* is distinguishable from this case in three significant respects. First, *Coleman* involved state legislators whose asserted interest had been "treated by the state court as a basis for entertaining and deciding the federal questions." 307 U.S. at 446. The majority did not dispute the conclusion of four Justices that the plaintiffs "[c]learly * * * would have no standing had [they] brought suit in a federal court." *Id.* at 465 (opinion of Frankfurter, J.). Second, *Coleman* involved an asserted defect in the process by which votes were counted within the state legislature, rather than in the administration of a duly enacted law. Finally, the Court did not hold that any individual member of the Kansas legislature would have had standing, but stated only that at least the twenty senators who voted to defeat the resolution ratifying the proposed constitutional amendment had a sufficient interest. *Id.* at 446.

Finally, the diminution of influence that appellees claim to suffer is not traceable to the defendants in this case. As we explain above, it is within Congress's power to exempt any appropriation from the Act's provisions, and thus to prevent the Act from having any operative legal effect. Whatever the practical likelihood of that occurrence, appellees have made no effort to explain how the named defendants—the Director of the Office of Management and Budget, and the Secretary of the Treasury—could be held responsible for Congress's decision not to do so. Because Article III "requires that a federal court act only to redress injury that fairly can be traced to the challenged action *of the defendant*, and not injury that results from the independent action of some third party not before the court," *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (emphasis added), appellees' allegation of diminished influence within the legislative process would be insufficient to establish the existence of a case or controversy even if such a loss of influence could be said to constitute judicially cognizable injury.

B. 1. In our opening brief, we survey the history of federal appropriations laws from 1789 to the present. For appellees, however, the history of Executive Branch spending discretion begins not in 1789 but in 1974, with the enactment of the Impoundment Control Act (ICA). Appellees' apparent view is that the ICA embodies the limits that the Constitution places on Congress's power to vest spending discretion in the Executive Branch. The Line Item Veto Act, in this account, represents a fall from constitutional grace because (and to the extent that) it departs from the ICA's limitations. See Appellee Br. 4-6, 41.

Appellees' focus on the ICA as a constitutional baseline is profoundly ahistorical. The legislative practice of giving the President substantial discretion over the ex-

penditure of appropriated funds has a 200-year pedigree. See Gov't Br. 2-6; Senate/House Amicus Br. 5-12. On those occasions when Congress has tightened controls on Executive Branch discretion, it has typically aimed at preventing overspending, not underspending. See, *e.g.*, Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251 (Anti-Deficiency Act) (codified as amended at 31 U.S.C. 1341).[8]

When seen in its proper historical context, the Line Item Veto Act is noteworthy less for the discretion it grants the President than for the limits it imposes on that discretion. The Act gives the President *less* control over federal spending than, for example, the First Congress conferred when it used lump-sum appropriations "not exceeding" specified amounts to fund the general operations of the federal government. See Gov't Br. 2-3; Senate/House Amicus Br. 5-6. The Act gives the President no authority to revise current levels of entitlement spending, which account for the lion's share of all federal outlays. ICA § 1026(8) (2 U.S.C. 691e(8)); J.S. App. 51a; see Gov't Br. 9 n.4, 45. With respect to spending items covered by the Act, the President is limited to two choices: to spend the full appropriated amount on the specified item or to use the whole amount to reduce the federal deficit. ICA §§ 1023(b), 1024 (2 U.S.C. 691b(b), 691c); J.S. App. 36a-39a; see Gov't Br. 44. The President must consider a number of

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[8] The Constitution itself reflects a concern with restraining, rather than compelling, expenditures by the Executive Branch. The Appropriations Clause (Art. I, § 9, Cl. 7) prohibits the drawing of money from the Treasury except "in Consequence of Appropriations made by Law." See generally *OPM* v. *Richmond*, 496 U.S. 414 (1990). That Clause was designed in part to ensure that the Executive Branch spends no more than Congress appropriates. See *id.* at 427; *Reeside* v. *Walker*, 52 U.S. (11 How.) 271, 291 (1851). The Constitution contains no comparable provision aimed at compelling the expenditure of appropriated funds.

statutory criteria in making that choice, ICA §§ 1021(a)(A), 1021(b), 1022(b) (2 U.S.C. 691(a)(A), 691(b), 691a(b)); J.S. App. 33a-34a; he must act within a limited time, ICA § 1021(a)(B) (2 U.S.C. 691(a)(B)); J.S. App. 33a; and he may not reverse course once he has made his decision. And because the President must determine that any cancellation will "reduce the Federal budget deficit," ICA § 1021(a)(A)(i) (2 U.S.C. 691(a)(A)(i)); J.S. App. 33a, he must, as a predicate for exercising his cancellation authority, have a reasonable basis for believing that there continues to be a deficit to reduce. Because the Act leaves the President with significantly less discretion than Congress has chosen to confer in prior spending laws, the historical record weighs heavily in favor of its constitutionality.

Ironically, appellees treat some of the Act's restrictions as a source of constitutional concern. For example, appellees regard it as problematic that the President must exercise his cancellation authority within five days (see Br. 38 n.22) and that he may not unilaterally undo a cancellation (see Br. 40). Those restrictions, however, serve to facilitate planning and prevent disruption of ongoing programs (see Gov't Br. 35-36 n.22; Senate/House Amicus Br. 21); and if the President were free to cancel or restore spending items at any time, he would enjoy far greater "leverage over the lawmaking process" (Appellee Br. 30) than he enjoys under the Act in its existing form.

2. In our opening brief (at 34-35), we explain that the Act does not conflict with the lawmaking procedures of the Presentment Clause because the Act does not come into play until after those procedures have been satisfied. When the President is presented with a spending bill, he must "sign" or "return" (Art. I, § 7, Cl. 2) it in its entirety. When he signs the bill, it becomes a law, and the "finely wrought" lawmaking procedures of the Present-

ment Clause (*INS* v. *Chadha*, 462 U.S. 919, 951 (1983)) are complete. Appellees acknowledge (Br. 39) that "the whole appropriation, tax, or spending bill becomes law the instant the President signs it." Their repeated assertions (Br. 6, 20, 37, 43, 45) that cancellation occurs "in conjunction with" signing cannot obscure the fact, critical to analysis under the Presentment Clause, that the President's cancellation authority arises only *after* he has fully complied with the requirements of the Clause.

Appellees nevertheless contend that the Line Item Veto Act "deliberately contravenes the spirit and purposes of the *in toto* requirement of the Presentment Clause" (Br. 38) because it is functionally indistinguishable from "a statute authorizing the President to veto some items in any future appropriation, spending, or tax bill at the same time he signs the remainder" (Br. 37-38).[9] That argument is flawed in two respects. First, the Presentment Clause prescribes the "procedure[s]," *Chadha*, 462 U.S. at 951, by which bills are enacted into law. The difference between the Act and appellees' hypothetical statute is the difference between a law that honors those procedures and a law that does not. It is no objection to a law that conforms to the Constitution that the same results could be achieved by a law that did not do so.

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[9] When the President exercises his cancellation authority, the Act's "lockbox" provision permanently reduces the amounts of budgetary resources that Congress may thereafter appropriate in any one fiscal year without triggering a sequester under the Budget Enforcement Act of 1990 (BEA). See Gov't Br. 10 n.6. Under a statute that permitted the President to remove spending items from bills before signing them into law, in contrast, those items would never become law, and the BEA's caps and "paygo" limits would remain unchanged. Appellees are thus incorrect in stating (Br. 38) that "postponement of cancellation until after signing has no real-world consequence whatsoever."

Second, the purpose of the *in toto* requirement is not to restrict Congress's ability to vest the President with discretion in administering the laws. To the contrary, some lawmaking practices that vest extremely broad discretion in the President are unquestionably consistent with the requirement that the President sign or return a bill *in toto*.[10] Rather, the *in toto* requirement protects Congress against presidential usurpation of the lawmaking function by preventing the President from (in effect) creating laws through emendation of bills presented to him. Because the *in toto* requirement serves to ensure that the President remains within the bounds established by Congress—rather than to restrict Congress in deciding what those bounds should be—a decision by Congress itself to confer discretion upon the President cannot be contrary to the "spirit" or "purpose" of that requirement.[11]

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[10] Lump-sum appropriations laws, for example, are clearly consistent with the requirement that the President must sign or return a bill in its entirety. Alternatively, Congress might adopt the practice of enacting each line item as a separate bill, which the President could "sign" or "return." Such a practice would clearly be constitutional, yet it would vest the President with discretion functionally comparable to that which he possesses under the Line Item Veto Act.

[11] If the President were vested with partial veto power by the *Constitution*, he would indeed have the power to "reshape legislation to produce results that would never have passed Congress." Appellee Br. 12. The exercise of that power would result in laws whose terms had not been approved, and might well have been rejected, by the legislature. See *Bengzon* v. *Secretary of Justice*, 299 U.S. 410, 414 (1937). Because Congress retains the power to render the Line Item Veto Act inapplicable to any particular appropriations law, however, the Act creates no risk of a law whose contents are against the will of Congress. Rather, Congress's passage of an appropriations bill that does not alter the "default rule" (see Gov't Br. 30-31) established by the Act manifests an intent that the President be permitted either to spend, or to impound for deficit reduction purposes, each qualifying item contained therein. See pages 17-18, *infra*; Gov't Br. 50.

3. Because the requirement that the President must sign or return a bill *in toto* places no limitations on Congress's power to vest the Executive Branch with discretion in the execution of federal laws, that power is limited only by the principle that Congress may not delegate legislative power to other officials. See Gov't Br. 40-42. In our opening brief, we show that the restrictions that the Act places on the President's cancellation authority easily satisfy this Court's nondelegation precedents. See *id.* at 44-46; see also pages 10-11, *supra*.

Appellees make virtually no effort to demonstrate that the Act fails to provide "intelligible principle[s]," *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989), to guide and cabin the President's discretion. Instead, they assert (Br. 46-49) that Congress may give the Executive Branch discretion over the operation of federal laws in only two situations: "to 'fill up the details' of a legislative scheme" or "to adapt a statutory program to [changing] circumstances." *Id.* at 50. Because they believe that the Act does not fit into either of those categories, appellees assert that it represents an unconstitutional "abdication" (*id.* at 45) of lawmaking power by Congress. Appellees' characterizations of Congress's powers under the Constitution and the President's powers under the Act are both mistaken.

As the Court explained in *Bowles* v. *Willingham*, 321 U.S. 503, 515 (1944), "Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority." The reasons why Congress chooses the particular course it does are irrelevant. This Court has recognized, for example, that Executive Branch officials may permissibly be vested with "policymaking responsibilities" when Congress itself is "unable to forge a coalition on either side of the question, and those on each side decide[] to take their chances with

the scheme devised by the agency." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). So long as Congress "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority," *Mistretta*, 488 U.S. at 372-373, it has discharged its lawmaking responsibilities under Article I.[12]

As we explain above, see note 10, *supra*, the President's cancellation authority under the Act is functionally comparable to the power that he would possess if Congress adopted the (unquestionably constitutional) practice of enacting each line item as a separate law. The Act places far greater constraints on the President's discretion than did the lump-sum appropriations laws favored by early Congresses. See *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322 (1937) (constitutionality of lump-sum appropriations "has never been seriously questioned"). In light of the availability of alternative mechanisms by which the President could be vested with equal or greater authority over the expenditure of federal funds, the Line Item Veto Act cannot be said to effect an impermissible shift in the balance of power between the Legislative and Executive Branches.[13]

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[12] In attacking the Act on delegation grounds, appellees apparently contend that Congress may confer discretionary authority only when, and to the extent that, such discretion is somehow "necessary" to achieve Congress's goals. This Court has squarely held, however, that "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." *Yakus* v. *United States*, 321 U.S. 414, 425-426 (1944). And the Court has sustained grants of authority that cannot be justified by any such notion of legislative necessity. See, *e.g.*, *Loving* v. *United States*, 116 S. Ct. 1737 (1996).

[13] Appellees suggest (Br. 42) that the Line Item Veto Act is constitutionally indistinguishable from a statute giving the President

Moreover, the Act confers authority on the President with respect to matters—the budget and expenditures—in which he has preexisting authority and accumulated expertise based on historical practice, his responsibility for execution of the laws, his superintendence of the Executive Branch, and the assistance of the heads of Departments (see U.S. Const. Art. II, § 2, Cl. 1) and the Director of OMB.[14] This Court has recognized that Congress has especially broad latitude to vest discretionary authority when it is "set within boundaries the President may not exceed" and the President has inde-

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plenary power to strike "unnecessary" provisions from civil rights or other laws. The relevant question in any such case would be whether the law provided "intelligible principles" to guide and cabin the President's discretion. In addition, the Line Item Veto Act does not regulate primary conduct, and it operates in an area where the President has historically been accorded broad authority. See page 16, *infra*.

[14] The Framers anticipated this role for the Executive:

> The administration of government, in its largest sense, comprehends all operations of the body politic, whether legislative, executive, or judiciary; but in its most usual and perhaps in its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, *the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature*, the arrangement of the army and navy, the direction of the operations of war—these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government.

The Federalist No. 72, at 435-436 (Rossiter ed. 1961) (Hamilton) (emphasis added). Congress reinforced the President's central role when it enacted the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20, which assigned to the President the responsibility for formulation of a national budget and created a Bureau of the Budget to assist him.

pendent authority over the subject matter. See, *e.g.*, *Loving* v. *United States*, 116 S. Ct. 1737, 1750-1751 (1996).

4. Appellees' principal contention is that the President's exercise of cancellation authority under the Act constitutes a statutory "repeal" that must itself conform to the lawmaking requirements of Article I. As we explain in our opening brief (at 46-49), however, Congress has frequently vested the President with the authority to suspend, limit, or otherwise modify the operation of federal laws. As long as Congress provides intelligible standards for the exercise of that authority, the President is exercising not the Article I power to repeal a law, but rather his Article II power to "faithfully execute" the laws. See, *e.g.*, *Intermountain Rate Cases*, 234 U.S. 476 (1914); *Field* v. *Clark*, 143 U.S. 649 (1892).

There is, in particular, no basis for appellees' assertion (Br. 50) that the Line Item Veto Act permits the President to "undo part of what Congress has just done," or to "decid[e] that a part of a law that he has just signed shall not be executed." As we explain above and in our opening brief (at 30-31), Congress retains the power to determine, with respect to each appropriations law, whether and to what extent the provisions of the Act will apply. Read against the backdrop of the Line Item Veto Act, an appropriations law that does not otherwise specify the scope of the President's discretion must be understood to authorize him either to spend, or to cancel, each item that is subject to the Act. See Gov't Br. 50.[15]

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[15] Appellees' contention that cancellation of budgetary items prevents the faithful execution of the laws is particularly untenable in light of the manner in which appropriations laws have been construed and administered since the ICA was enacted in 1974. Prior to the Line Item Veto Act, the question whether a particular appropriation was permissive or mandatory was governed not only by the language of the appropriations law itself, but by the background rules established by

Thus, an "A-B-C bill" (Appellee Br. 25) will be construed, absent express contrary language, to mean that "the President may either spend, or cancel, each of the items A, B, and C." The President's cancellation of an item therefore does not "undo" any portion of the appropriations law, nor does it reflect a decision that part of the law "shall not be executed." Rather, the possibility of cancellation is an integral feature of the appropriations law from the moment it is enacted. Cancellation of budgetary items pursuant to the Act is therefore a faithful execution of the laws, not a repeal or abrogation thereof.[16]

The fact that the President's cancellation of spending items is irrevocable does not transform cancellation authority into a power of statutory repeal. There is nothing novel about federal laws whose provisions may be rendered permanently inoperative by presidential action. For example, the Defense Production Act of 1950, 50 U.S.C. App. 2061 *et seq.*, provides that the President "by proclamation may terminate this Act." 50 U.S.C. App. 2166(b)(1). Similarly, the Agricultural Adjustment Act, 7 U.S.C. 601 *et seq.*, provides that it "shall cease to be in effect" if the President "finds and proclaims" that a national agricultural emergency "has been ended." 7 U.S.C. 613. See also, *e.g.*, 22 U.S.C. 1965 (joint resolution

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the ICA. The Line Item Veto Act, which is part of the ICA, simply changed the background rules.

[16] The Controlled Substances Act, for example, permits the Attorney General to add and remove substances from the list of controlled substances specified in the statute. See 21 U.S.C. 811(a)(1)-(2), 812; *Touby* v. *United States*, 500 U.S. 160, 162 (1991). As a result, the Executive Branch can engage in the kind of post-enactment "A-B-C" adjustments to which appellees object. This Court nevertheless has held that the existence of the Executive Branch's discretion over the contents of the controlled substances list does not render the Controlled Substances Act unconstitutional. See *Touby*, 500 U.S. at 164-169.

authorizing economic and military aid to Middle Eastern nations "shall expire" when President determines that peace and security in Middle East are adequately assured); Act of June 10, 1933, ch. 55, § 1, 48 Stat. 119 (law authorizing Reconstruction Finance Corporation to engage in specified loan and stock transactions may be "declared no longer operative" by President).

5. Contrary to appellees' contention (Br. 41 n.26, 42), the cancellation of limited tax benefits (see ICA § 1021(a)(3) (2 U.S.C. 691(a)(3)); J.S. App. 33a) is also a form of discretionary administrative authority, not a statutory repeal. This Court has squarely held that "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that [the Court] ha[s] applied to other nondelegation challenges," *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989), and Congress has frequently vested the President with discretionary authority over the imposition of taxes. See, *e.g.*, *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 405-410 (1928) (rejecting nondelegation challenge to "flexible tariff" provisions of Tariff Act of 1922); *Field* v. *Clark*, 143 U.S. at 682-693 (rejecting nondelegation challenge to similar provision of Tariff Act of 1890 and citing many similar statutes). The President's authority to cancel limited tax benefits is governed by "intelligible principles." Because the provisions subject to cancellation will affect very small numbers of taxpayers, see ICA § 1026(9)(A) (2 U.S.C. 691e(9)(A)); J.S. App. 52a, the President has no wide-ranging authority to reshape the basic corpus of federal tax law. Cancellation of a limited tax benefit, moreover, does not subject the affected taxpayers to a special disability; it simply ensures that their tax liability is gov-

erned by the generally applicable requirements imposed by the remainder of the Internal Revenue Code.[17]

Even if the Act's provisions regarding limited tax benefits were found to be constitutionally deficient, that result would not affect the validity of the rest of the Act. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam) (internal quotation marks omitted). The Line Item Veto Act manifestly would remain "fully operative as a law" if the President's authority over limited tax benefits was stricken. Contrary to appellees' suggestion (Br. 41 n.26), the unexplained absence of a severability provision hardly makes it "evident" (*Buckley*, 424 U.S. at 108) that Congress would not have enacted the remaining provisions of the Act without the limited tax benefit provisions. See *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987) ("the absence of a severability clause * * * does not raise a presumption against severability").

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[17] To the extent there may be differences between expenditures and taxation for nondelegation purposes, however, they simply reinforce the conclusion that the constitutionality of each of the Act's provisions should ultimately be resolved in litigation involving a party whose interests are concretely affected by a particular cancellation.

For the reasons stated above and in our opening brief, the judgment of the district court should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. Alternatively, the judgment of the district court should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

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No. 96-1671

In The

Supreme Court of the United States

October Term, 1996

FRANKLIN D. RAINES, et al.,

Appellants,

v.

ROBERT C. BYRD, et al.,

Appellees.

On Appeal From The United States District Court
For The District Of Columbia

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QUESTION PRESENTED

Whether the Line Item Veto Act violates Article I of the Constitution by delegating legislative lawmaking authority to the President.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

PERMISSION TO FILE BRIEF AS AMICI CURIAE .. 1

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE LINE ITEM VETO ACT IS UNCONSTITUTIONAL UNDER THIS COURT'S NONDELEGATION DOCTRINE 2

II. THE DISTRICT COURT BETRAYS THE CONSTITUTIONAL PRINCIPLE OF ACCOUNTABILITY UPON WHICH IT CLAIMS TO STAND 4

III. A BRIEF HISTORY OF CONGRESSIONAL DELEGATION AND THE NONDELEGATION DOCTRINE 8

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980) 14

A.L.A Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 12, 19

Byrd v. Raines, No. 97-0001, slip op. at 34-35 (D.C. Dist. Ct. Apr. 10, 1997) ..... *passim*

Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County, 1 Ohio St. 77 (1852) 5

Coyne Bheam, Inc. v. United States Food and Drug Administration, ___ F.Supp. ___, 1997 WL 200007 (M.D.N.C) 16

Field v. Clark, 143 U.S. 649 (1892) 5, 19

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 9

Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) 5, 7, 13, 15, 17

Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980) 14

J.W. Hampton & Co. v. United States, 276 U.S. 394 (1928) 2, 3, 11, 12

Jordan v. De George, 341 U.S. 223 (1951) 13

Kent v. Dulles, 357 U.S. 116 (1958) 5

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) 11

Loving v. United States, ___ U.S. ___, 116 S. Ct. 1737 (1996) 5, 9, 18

Ludecke v. Watkins, 335 U.S. 160 (1947) 9

Mistretta v. United States, 488 U.S. 361 (1989) .. 2, 3, 13, 18

TABLE OF AUTHORITIES – Continued

Page

National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) 14

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) ...13, 17

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 12, 18

Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995) 9

Rock Royal Cooperative, 307 U.S. 533 (1939) 13

Smith v. Goguen, 415 U.S. 566 (1974) 13, 17

United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921) 11

United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624 (1995) 18

United States v. Rock Royal Cooperative, 307 U.S. 533 (1939) 14

Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924) 11

Yakus v. United States, 321 U.S. 414 (1944) 13

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 5

OTHER AUTHORITIES

U.S. Const. art. I § 1 .....4, 9

U.S. Const. art. I § 8 (spending and tax clauses) ...3, 4

2 U.S.C. § 691(a) 2, 3

5 U.S.C.A. §§ 801-08 18

H.R. 1036 (105th Cong., 1st Sess.) 16

TABLE OF AUTHORITIES – Continued

Page

S. 433 (105th Cong., 1st Sess.) 16

141 Cong. Rec. S4409-04 (March 23, 1995) 6

142 Cong. Rec. S2929-02 (March 27, 1996) 3

The Federalist No. 73 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961) 5

Henry Julian Abraham, *Justices and Presidents* (1974) 12

Robert Dahl, *Democracy and Its Critics* (1989) 15

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Nick Smith, *Restoration of Congressional Authority and Responsibility for the Regulatory Process*, 33 Harv. J. on Legis. 323 (1996) 16

Paul Verkuil, *Comment: Rulemaking Ossification: A Modest Proposal*, 47 Admin. L. Rev. 453 (1995) 16

TABLE OF AUTHORITIES – Continued

Page

Battleground '94, Greenberg-Lake: The Analysis Group (1994) 6

Congressional Q. Weekly, April 12, 1997 5

Congressional Q. Weekly, Dec. 31, 1994 6

New York Times, March 29, 1997 17

Roll Call, April 17, 1997 17

With Our Readers, 13 Constitutional Review 98 (1929) 12

PERMISSION TO FILE BRIEF AS AMICI CURIAE

David Schoenbrod and Marci Hamilton file this brief as *amici curiae* in support of Appellees, pursuant to Sup. Ct. R. 37.2. A letter of the Appellant, dated May 7, 1997, and a letter of the Appellees, dated May 8, 1997, by which counsel for the parties evidenced their consent to the filing of this *amicus curiae* brief have been filed with this Court.

INTERESTS OF AMICI CURIAE

Professors David Schoenbrod and Marci Hamilton are law professors who specialize in constitutional and policy perspectives on legislative delegation. They are submitting this brief out of concern that the district court's reasoning eviscerates this Court's nondelegation doctrine even though it reaches the right result.[1]

SUMMARY OF ARGUMENT

Under this Court's existing nondelegation doctrine, the Line Item Veto Act is unconstitutional. The Act delegates lawmaking authority from the Congress to the President and in so doing provides no intelligible principle

[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* disclose that, while preparing this brief, they received compensation for assisting counsel for the American Petroleum Institute in preparing its *amicus* brief in this case. The views expressed in this brief are solely those of its authors, Professors Hamilton and Schoenbrod, and do not express the views of the American Petroleum Institute.

for the exercise of such delegated authority. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989), citing *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928).

The Line Item Veto Act is a transparent violation of the nondelegation doctrine that should be understood within the larger picture of the Constitution's rule against delegation. From a constitutional perspective, it is closely akin to the pervasive practice of agency delegation in which Congress avoids accountability by leaving the hard policy choices to unelected and unaccountable agencies.

The district court's opinion is untrue to the constitutional principle of accountability upon which its discussion purports to stand. This *amicus curiae* brief is being filed as a corrective to the opinion below. It explains why the Line Item Veto Act violates the nondelegation doctrine, provides an overview of the relevant constitutional landscape, and offers a brief history of congressional delegation and this Court's nondelegation doctrine.

ARGUMENT

I. THE LINE ITEM VETO ACT IS UNCONSTITUTIONAL UNDER THIS COURT'S NONDELEGATION DOCTRINE

Under this Court's existing doctrine, the Line Item Veto Act is an unconstitutional delegation of legislative lawmaking power. The Act permits the President to "cancel" any dollar amount of any discretionary budget authority, any item of new direct spending, and any limited tax benefit. 2 U.S.C. § 691(a). This cancellation

power is the functional equivalent of a legislative act, the repeal of a spending or tax statute. As such, the Act delegates to the President a legislative power that the Constitution vests solely in the Congress.

This Court has held that Congress may delegate legislative lawmaking power if a delegating statute provides an "intelligible principle" that guides the executive branch to carry out the will of Congress. *Mistretta v. United States*, 488 U.S. 361, 371-73 (1989), citing *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928). The Line Item Veto Act, however, provides no intelligible principle to guide the President. He is empowered to repeal an item if he finds that doing so would

(i) reduce the Federal budget deficit;
(ii) not impair any essential Government function; and
(iii) not harm the national interest.

2 U.S.C. § 691(a). The first requirement is a tautology and the second and third are all but contentless. These are not intelligible principles, but rather blatant prescriptions for independent executive branch lawmaking over the spending and taxing powers explicitly reserved to the Congress in Art. I. *See* U.S. Const., art. I, § 8 & § 7. As Senator Ted Stevens, who was the lead Senate negotiator of the Act in the Conference Committee, acknowledged, in filing the Conference Report, the Act is "the most significant delegation of authority by Congress to the President since the Constitution was ratified in 1789." 142 Cong. Rec. S2929-02, *2955 (March 27, 1996). In light of this Court's existing doctrine, a decision in this case to

invalidate the Line Item Veto Act can be quite straightforward.[2]

II. THE DISTRICT COURT BETRAYS THE CONSTITUTIONAL PRINCIPLE OF ACCOUNTABILITY UPON WHICH IT CLAIMS TO STAND

The district court based its ruling on the constitutional principle that Congress and the President, acting through the Article I legislative process, must be accountable to the voters for government's major policy choices. It stated, "The Line Item Veto Act . . . hands off to the President authority over fundamental legislative choices. Indeed, that is its reason for being. It spares Congress the burden of making those vexing choices of which programs to preserve and cut." *Byrd v. Raines*, No. 97-0001, slip op. at 34-35 (D.C. Dist. Ct. Apr. 10, 1997).

The ground rules of accountability in the United States are determined by the Constitution, which places federal lawmaking in the hands of elected representatives in two separate branches. Accordingly, Article I of the Constitution begins: "All legislative Powers herein granted shall be vested in a Congress" and specifies that there is only one path that a bill may take in order to become law. U.S. Const. art. I § (1). *See* U.S. Const. art. I § 7(2). All bills must be passed by the House and the Senate and presented to the President for approval before they may become law. *Id.* The President's only power to prevent a bill from becoming law is through veto of the

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[2] Amici curiae take no position on the standing or ripeness issues addressed by the district court.

bill that has been presented by Congress. *Id.* The Constitution is remarkably and brilliantly clear on this essential point. *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 945 (1983) ("Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.").

The Framers believed that requiring the laws to be enacted by majorities in a bicameral legislature and then presented to the President would guarantee representative democracy and discourage intrusions on liberty that lack broad public support.[3] *See Loving v. United States*, ___ U.S. ___, 116 S. Ct. 1737, 1743 (1996), *Chadha*, 462 U.S. at 951; *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *The Federalist No.* 73 at 494-95 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961). Thus, this Court distinguishes " ' "between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." ' " *Loving*, ___ U.S. ___, 116 S. Ct. at 1744, quoting *Field v. Clark*, 143 U.S. 649, 693-94 (1892), quoting *Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852).

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[3] Lead Appellee Senator Robert Byrd celebrated the district court's ruling in just these terms – as "a great day for the Constitution and the American people because it was their power – not mine – their power of the purse that was preserved." *Cong. Q. Weekly*, April 12, 1997 at 833.

The concept of a line item veto has gained momentum as a means of increasing congressional accountability. Thus, it has been popular with the voters.[4] Just as sensible consumers want itemized bills from shops, so do many voters want elected officials to take itemized responsibility for governmental spending. When Congress and the President lump many spending items together, they escape responsibility for the pork barrel items and so are free to engage in logrolling. The Constitution does not settle the question of whether bills should encompass only one item or bundle many of them together.[5]

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[4] For example, when one poll asked whether the President should "have the authority to veto individual items in the federal budget," 64% responded yes, 31% responded no, and 5% had no opinion. ABC News, *ABC News Poll: Survey Beginning Jan. 3, 1995.* Of those sampled in another poll, 57% supported a "full line item veto which would require Congress to have a two-thirds vote to override the President's veto," 30% supported "a limited line item veto which would require only a simple majority vote in Congress in order to override the President's veto," while 8% opposed the veto and 5% were unsure. *Battleground '94,* Greenberg-Lake: The Analysis Group, (1994).

[5] It is reported that Appellee Senator Byrd has been a leading opponent of itemizing appropriations. For example, he used his official power to block for three years a clearly constitutional form of line item veto ("expedited rescission"). *Cong. Q. Weekly,* Dec. 31, 1994, at 3598. He has opposed a form of line item veto requiring Congress to vote item-by-item to override vetoes because spending items of interest to only one state lack the "national interest" needed to prompt an override. 141 Cong. Rec. S4409-04, *S4413 (March 23, 1995). Byrd supported expedited rescission in 1995 only as an alternative to a stronger version of the line item veto.

The Constitution does, however, dictate the process by which laws are made. Congress has no power to deviate from Article I. The district court appropriately invalidated the Act on the basis that it delegates to the President a legislative power (to repeal spending items and tax benefits) that Article I confers solely to the Article I legislative process. The court below rightly held that the Act violates the rule against delegation, stating that "cancellation is equivalent to repeal and 'repeal of statutes, no less than enactment, must conform with Art. I.' " Slip op. at 31 (quoting *Chadha*, 462 U.S. at 954.).

Yet, while employing the correct principle to invalidate the Line Item Veto Act, the district court attempted in dictum to jettison that principle as applied to delegation to agencies. The district court stated, "It has long been held that Congress may – indeed, of necessity, must – delegate vast authority to the Executive Branch of government to make and to change rules for the governance of national affairs, so long as they are in furtherance of the will of Congress." Slip op. at 29. This distinction cannot bear constitutional scrutiny.

While the threat to accountability posed by the Act is real,[6] the threat posed by delegation of lawmaking power

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[6] The Act alters the lawmaking calculus in such a way that congressional accountability is decreased at certain points though increased at others. Under the Act, the President's canceling of items sets in motion an expedited process through which Congress considers whether to reenact some or all of those canceled. 2 U.S.C. § 691d(d), (e). The Act specifically allows Congress to do so by lumping them together instead of treating them individually. 2 U.S.C. § 691d. Thus, the Act increases somewhat Congress's responsibility for items that the

to agencies is massive and certain. Surely, the constitutional evil found in delegation to agencies is no less real than the constitutional evil correctly identified in the Line Item Veto Act. Such agency rulemaking is the functional equivalent of a legislative power just as is the cancellation power granted by the Act. In both the Line Item Veto Act and agency delegation, Congress shirks its constitutional responsibility to make the law by delegating to the executive branch important policy decisions. *See* slip op. 34-35. By delegating to agencies, Congress evades accountability for the laws imposed upon the public. David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993). The district court's reasoning, taken in no small part from the federal government's brief below (Memorandum of Points and Authorities in Support of Defendants' Alternative Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 19-23), seeks to save delegation to agencies but to strike delegation to the President.

III. A BRIEF HISTORY OF CONGRESSIONAL DELEGATION AND THE NONDELEGATION DOCTRINE

The Constitution states that "[a]ll legislative Powers herein granted shall be vested in a Congress. . . . " U.S.

President cancels, but reduces its responsibility for the overall mix of items in the budget. Concomitantly, because it allows the President to strike specific items, the Act arguably increases the President's accountability.

Const. art. I, § 1. From the earliest days of the Constitution, there is ample evidence demonstrating that both the Framers and this Court believed that representatives should be required to make the hard policy choices and that the Court took the nondelegation doctrine seriously. *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388-89 (1813), *The Virginia Report of 1799-1800. Touching of the Alien and Sedition Laws. Together with the Virginia Resolutions of December 21, 1798*, at xv, 23 (Leonard W. Levy ed. 1970). *Ludecke v. Watkins*, 335 U.S. 160 (1947) (discussing Alien Act of 1789), Alexis de Tocqueville, *Democracy in America*, 57-58 (Phillips Bradley ed. 1946). *See also*, Schoenbrod, *supra*, at 30-33 (discussing examples from 18th and 19th centuries). The legislative power is to make rules of private conduct, as *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (Marshall, C.J.), made clear: "[it] is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Id.* at 136; *see also Loving*, ___ U.S. ___, 116 S. Ct. at 1744; *Plaut v. Spendthrift Farm, Inc.*, ___ U.S. ___, 115 S.Ct. 1447, 1455 (1995).

According to this understanding of Article I, Congress alone may make the rules that govern private persons and states. Congress can leave to other branches the interpretation and application of those rules, as well as functions that are not Article I legislative powers, such as the management of government departments and property. *See* Schoenbrod, *supra*, at ch. 12 (discussing the application of this test). Such a standard of unconstitutional delegation is consistent with the purposes of Article I. Branches other than the legislative will face hard

decisions in, for example, interpreting statutes and in exercising prosecutorial and remedial discretion; but it is the legislators who will have to face the hard legislative policy choices and take responsibility for their resolution. In stating rules of conduct, the legislature cannot simply promise the best of everything to everyone, but rather must make manifest the costs, as well as the benefits of its actions. *See, generally, id.* at 183-84, 186-89.

Before 1890, Congress did not routinely delegate its legislative powers. Around 1890, legislative practice began to change. According to an eminent historian, Professor Robert H. Wiebe, this shift sprang from basic changes in the economy and politics. Wiebe, *Self-Rule: A Cultural History of American Democracy* (1995). While power had previously resided principally in the institutions centered on the Main Streets of America, from 1890, nationally oriented institutions, such as nationally oriented businesses, unions, associations, and universities, took on increasing importance. *Id.* at ch. 6. These national institutions were run by a new managerial class, trained in what was thought of as scientific methods. *Id.* at 143. Its members believed that scientific managers should not have to account to lay people. *Id.* This class set out to insulate government from the lower class's influence by various devices, including poll taxes and literacy tests (applied to the lower class of all races) and the delegation of legislative power to expert agencies. *Id.* at 134-37, 164-65, 173-80, 206-07, 217-22.

Many members of this managerial class, however, did not think of the agencies as exercising legislative power because they differentiated expertise from policymaking. So infatuated was this class with science as the

universal solution to policy problems that it saw the agencies as following instructions rather than making law. For this reason, many zealous supporters of expert agencies could also think of themselves as supporting the separation of powers. Thus, from 1890 through the 1920s, as Congress started to delegate, the Supreme Court upheld some covert delegations on the basis that they gave the agencies the power to implement law rather than make it. Schoenbrod, *supra*, at 31-36 (listing cases).

It also invalidated some laws for delegating unconstitutionally. On at least three occasions prior to 1928, the Court struck statutes on delegation grounds. *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924) (prohibiting Congress from delegating the "power to alter, amend or revise the maritime law" to states); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 87-88, 92-93 (1921) (holding that a vague statute "amounted to a delegation by Congress of legislative power to courts. . . . "). *Id.* at 86-87. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920) (holding improper delegation of maritime law to the states).

In 1928, this Court upheld a tariff statute under a new test: "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). The "intelligible principle" in that case provided only limited direction so that the statute, in fact, delegated legislative power. President-elect Herbert Hoover, a true believer in scientific government and also of separation of powers, reacted angrily:

> The American people will never consent to delegating authority over the tariff to any commission, whether non-partisan or bi-partisan. Our people have a right to express themselves at the ballot upon so vital a question as this.
>
> There is only one commission to which delegation of that authority can be made. That is the great commission of their own choosing, the Congress of the United States and the President. It is the only commission which can be held responsible to the electorate.

With Our Readers, 13 Constitutional Review 98, 100 (1929) (quoting speech of Oct. 15, 1928). An editorial in the Constitutional Review said the statute upheld in *Hampton* "was the most dangerous advance in bureaucratic government ever attempted in America." *Id.* at 101.

Despite the broad and troubling language of *J. W. Hampton*, it was used by this Court to invalidate New Deal laws that evidenced a tremendous increase in the scope of delegation. Justice Cardozo, concurring in a unanimous decision to strike the National Recovery Act, called it "delegation running riot." *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 553 (1935). The 9-0 and 8-1 votes in *Schechter*, 295 U.S. 295 at 551, and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935) emphasize the constitutional potential in the *J. W. Hampton* rule. However, Franklin Roosevelt's court-packing plan, and not intellectual persuasion, softened the Court's resolve to invalidate congressional delegations. Henry Julian Abraham, *Justices and Presidents* 198 (1974). While the "intelligible principle" test announced in *J.W. Hampton*, has been read appropriately to mean that Congress must state the rules of conduct, *Panama Refining Co.*, 293 U.S. at

421,[7] it has generally come to mean that it is sufficient for Congress to state only its goals even as it ducks the hard policy choices. *E.g., Mistretta*, 488 U.S. at 372-73; *Rock Royal Cooperative*, 307 U.S. 533, 574 (1939).

Still, the nondelegation doctrine has retained some vitality. Various coalitions of justices have struck particular agency laws. For example:

- *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976), struck down a statute for delegating to the Civil Service Commission the power to make a law preventing legal aliens from holding civil service jobs. *Id.* at 122 (Rehnquist, J., dissenting).

- *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) struck down hundreds of statutes that delegated to one or two houses of Congress the lawmaking power delegated by the Constitution to the Article I legislative process. *Id.* at 986-87 (White, J., dissenting).

- Void for vagueness cases not only require that the public be given notice of what is forbidden, but deny to executive officials the power to make the law. *E.g., Smith v. Goguen*, 415 U.S. 566, 572-73 (1974).[8]

- Various cases have struck down city ordinances and state or federal statutes delegating overly broad discretion to regulate or punish speech or religion. *See generally* Laurence H. Tribe, *American Constitutional Law* §§ 12-38 (2d ed. 1988).

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[7] See also, *Yakus v. United States*, 321 U.S. 414, 424-25 (1944).

[8] The void for vagueness doctrine applies to civil as well as criminal offenses, *Jordan v. De George*, 341 U.S. 223, 231, *reh'g denied*, 341 U.S. 956 (1951), and statutes that delegate to agencies often make violations of agency created laws a criminal offense.

- Various cases have interpreted statutes to avoid perceived delegation problems, although the net effect is that the courts made the legislative policy decisions not made by Congress. *E.g., Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646 (1980); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974).

Although this Court has struck agency laws on delegation grounds in many special circumstances, it generally affirms delegations in which Congress has not made the hard choices. *E.g., Mistretta*, 488 U.S. at 422 (Scalia J., dissenting); *United States v. Rock Royal Cooperative*, 307 U.S. 533, 574-76 (1939) (upholding statute that delegated authority to make regulations to create "orderly" markets while taking the interest of consumers into account). Thus, the main harm to representative democracy continues.

A variety of rationales have been advanced to justify delegation, none of which mitigate its constitutional defects. One rationale is that the agencies are experts, and Congress is not. Yet, the hard choices delegated are, at bottom, questions of policy rather than technical questions best resolved by experts. A leading political scientist, Professor Robert Dahl, argues that

> No intellectually defensible claim can be made that policy elites (actual or putative) possess superior moral knowledge or more specifically superior knowledge of what constitutes the public good. Indeed, we have some reason for thinking that specialization, which is the very ground for the influence of policy elites, may itself impair their capacity for moral judgment. Likewise, precisely because the knowledge of the

> policy elites is specialized, their expert knowledge ordinarily provides too narrow a base for the instrumental judgments that an intelligent policy would require.

Dahl, *Democracy and Its Critics* 337 (1989). Congress can call on technical advisors no less expert than those available to agency heads and willingly passes on technical questions when it is politically convenient to do so.

Another rationale for delegation is that it is a necessity of modern government because of the volume of work. This rationale is circular. By skewing legislators' political incentives, delegation encourages Congress to treat more and more issues in more and more detail through the federal bureaucracy. Although this bulking up of the regulatory state does not justify delegation, it must be faced in considering whether it can be ended. One sensible approach among others that Congress could take is described in an article by now-Justice Breyer in which he suggested that Congress could respond to the decision in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), by enacting a statute requiring that agency regulations be enacted through the legislative process rather than promulgated as agency rules. Stephen Breyer, *The Legislative Veto After Chadha*, 72 Geo. L. J. 785 (1984). He offered many variations on this approach, such as an expedited legislative process, *id.* at 793-94, which would take less time than judicial review of agency regulations. Justice Breyer's ideas have prompted bills by Congressman J.D. Hayworth and Senator Sam

Brownback. H.R. 1036 and S. 433 (105th Cong., 1st Sess.)[9] Another approach would be for Congress to take responsibility for at least the major rules. *See, e.g.*, Congressman Nick Smith, *Restoration of Congressional Authority and Responsibility for the Regulatory Process*, 33 Harv. J. on Legis. 323 (1996); Paul Verkuil, *Comment: Rulemaking Ossification: A Modest Proposal*, 47 Admin. L. Rev. 453, 457-59 (1995).

This Court has an equal constitutional responsibility to hold the line on delegation. As Justice Scalia wrote: "the argument may be made that in modern circumstances the unconstitutional delegation doctrine, far from permitting an increase in judicial power, actually reduces it. For now that judicial review of agency action is virtually routine, it is the courts, rather than the agencies, that can ultimately determine the content of standardless legislation." Antonin Scalia, *A Note on the* Benzene *Case*, 4 Reg. 25, 28 (July-Aug. 1980). *See also*, Carl McGowan, *Congress, Courts, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1120 (1977).[10] Content review rather than nondelegation review puts the Court directly in the center of controversial policy decisions such as the recent or pending White House proposals for the Food and Drug Administration to regulate tobacco, *Coyne Bheam, Inc. v. United States Food and Drug Administration*, ___ F.Supp. ___, 1997 WL 200007 (M.D.N.C), the Federal Election

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[9] So far, the bills have 39 sponsors in the House and eight in the Senate, including Senate Majority Leader Trent Lott.

[10] Judicial deference to agency lawmaking reduces judicial policy making, but only at the price of making even more fictional the notion that the agency is directed by statute.

Commission to enact the McCain-Feingold campaign finance reforms by promulgating a rule (*Clinton Considers Pushing Election Panel on Soft Money*, New York Times, March 29, 1997 at 11), or the Federal Communication Commission to require television stations to provide free air time for candidates (FCC Gets Ready to Force Free TV Issue, Roll Call, April 17, 1997 at 1). By enforcing the nondelegation doctrine, this Court would in fact reduce its involvement in matters properly left to the legislative process.

The truth is that this Court has enforced the nondelegation doctrine selectively and inconsistently. Justices with diverse viewpoints have often expressed concern that the Court's nondelegation doctrine is contradictory. *See e.g., Smith v. Goguen*, 415 U.S. 566, 591-604 (1974) (Rehnquist, J., dissenting); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 112 (1976) (Rehnquist, J., dissenting); *American Petroleum Institute*, 448 U.S. at 717-18 n.30 (Marshall, J., joined by Brennan, White, and Blackmun, J.J., dissenting); *National Cable Television Ass'n*, 415 U.S. at 352-54 (Marshall, J., joined by Brennan, J., dissenting); *Chadha*, 462 U.S. at 986-87 (White, J., dissenting); *see also* Schoenbrod, *supra*, at 40-45, 181. The lower court's opinion would deepen the selectivity and inconsistency in nondelegation jurisprudence – by overturning the Line Item Veto Act but acquiescing in a weakly applied doctrine in the agency delegation context. This case offers the Court the opportunity to place its nondelegation doctrine on a more internally consistent and less political plane.

The burden of upholding the Constitution is not the Court's alone. The Congress has a constitutional obligation as strong as the Court's to keep delegation in line. As

Justice Kennedy, joined by Justice O'Connor, stated in his concurring opinion in the decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 1639 (1995):

> [I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.
>
> At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role.

Thus, the Congress has rightly stepped forward to begin to grapple with the delegation problem with recently enacted legislation (5 U.S.C.A. §§ 801-08 (1996, Supp. 1997) (expedited congressional review of agency rules)) as well as the pending legislative proposals previously discussed. On the Court's side, this Court's decision in *Lopez* and its discussion of delegation in *Loving* signal the Court's appropriately increasing readiness to provide meaningful boundaries to the limited powers accorded Congress in Article I.

In principle, this Court has always agreed that Article I limits the power of Congress to delegate its responsibility to make the law. *Loving*, ___ U.S. ___, 116 S. Ct. at 1744; *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935);

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-30 (1935); *Field v. Clark*, 143 U.S. 649, 692 (1892); *see also* Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorney-ship Model of Representation*, 69 N.Y.U. L. Rev. 477, 544-54 (1994) (discussing independent decisionmaking responsibility of legislators). The people, no less than Congress, have a right to hear the Court explain how the Constitution requires Congress and the President to be accountable by taking responsibility for the laws that government imposes on the public. This Court should continue its commitment to this core structural constitutional requirement by clarifying and buttressing the nondelegation doctrine in this case.

CONCLUSION

Article I of the Constitution prevents Congress from abdicating its responsibility to make the hard policy choices. If the Court fails to invalidate those laws in which Congress abdicates its central constitutional role, this Court will have deprived the people, the States, and the Congress of the guidance necessary to bring legislative practices within the constitutional fold. Accordingly, *amici curiae* urge this Court to hold that the Line Item

Veto Act is an unconstitutional transfer of lawmaking authority from the Congress to the President.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL.,

Appellants,

vs.

SEN. ROBERT C. BYRD, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE ACT VIOLATES THE PRESENTMENT CLAUSE AND OFFENDS THE PRINCIPLES OF BICAMERALISM AND SEPARATION OF POWERS	3
A. Congress May Not Legislatively Alter the Lawmaking Requirements of Article I	3
B. The Line-Item Veto Upsets the Constitutional Balance of Power	5
C. The Act Is An Unconstitutional Attempt to Delegate Congressional Authority	8
II. THE ACT VIOLATES THE RULES CLAUSE	10
CONCLUSION	13

TABLE OF AUTHORITIES

Cases:	**Page**
Buckley v. Valeo, 424 U.S. 1 (1976)	3
Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976)	9
Field v. Clark, 143 U.S. 649 (1891)	8, 9
J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928)	8, 9
Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983)	4, 4n.2, 5
Loving v. United States, 116 S. Ct. 1737 (1996)	8
Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).	8
United States v. Ballin, 144 U.S. 1 (1892)	11
United States v. Smith, 286 U.S. 6 (1932)	11
U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)	3
Yakus v. United States, 321 U.S. 414 (1944)	10
Youngstown Sheet & Tube Company v. Sawyer, 343 U.S. 579 (1952)	8
Constitutional Provisions & Statutes:	
U.S. Const., Art. I, § 1	3, 8
U.S. Const., Art. I, § 2, cl. 5	4n.2
U.S. Const., Art. I, § 3, cl. 6	4n.2
U.S. Const., Art. I, § 5	4n.2
U.S. Const., Art. I, § 5, cl. 2	10, 11, 12
U.S. Const., Art. I, § 7, cl. 2	*passim*

	Page
U.S. Const., Art. II, § 1	4n.2
U.S. Const., Art. II, § 2, cl. 2	4n.2
U.S. Const., Art. V	4n.2
U.S. Const., Amend. XII	4n.2
2 U.S.C. § 691 *et seq.*	*passim*
2 U.S.C. § 691	10
2 U.S.C. § 691d	12
Other Authorities:	
141 Cong. Rec. S4443-S4449 (March 23, 1995)	2n.1
103 Cong. Rec. 178 (1957)	11
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No. 96-1671

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL.,

Appellants,

vs.

SEN. ROBERT C. BYRD, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICUS*

The Association of the Bar of the City of New York (the "Association") is a professional association of more than 20,000 attorneys, chartered to study, address and promote the rule of law and, where appropriate, the reform of the law. The Association, by its Committee on Federal Legislation, has followed attempts in recent years to enact line item veto

* Pursuant to Rule 37.6, this brief was authored and prepared in its entirety by the Association of the Bar of the City of New York.

legislation[1] and has carefully studied the Line Item Veto Act, 2 U.S.C. §§ 691 *et seq.* ("the Act"). For the reasons set forth below, the Association believes that the Line Item Veto Act is an effort to accomplish an unconstitutional end by unconstitutional means. If upheld, the Act will undermine, in fundamental and dangerous ways, the Constitution's mechanism for federal lawmaking. With the consent of the parties, the Association of the Bar of the City of New York respectfully submits this brief, as *amicus curiae*, and urges this Court to strike down the Act.

SUMMARY OF ARGUMENT

The Act offends the Constitution in several ways. First, the Act would rearrange the very structure of our government, taking significant responsibilities from Congress and transferring them to the executive. The allocation of power between these branches is laid out in detail in the Constitution, and Congress cannot change that structure by legislative fiat. Revisions of this magnitude require amendment to the Constitution. Second, by transferring to the President the power unilaterally to cancel portions of existing law, the Act violates the Presentment Clause and undermines the bicameral structure of Congress and the separation of powers. Furthermore, the Act is an impermissible effort by Congress to delegate to the President its most basic duty -- to determine what the law shall be. As such, it would radically upset the constitutionally contemplated process of political compromise within the legislative branch and between the legislative and executive branches. Finally, the Act establishes rules of procedure for succeeding Congresses, thereby violating the Rules Clause.

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[1] The Committee's published opinion on an earlier line item veto bill was read into the Congressional Record. 141 Cong. Rec. S4443-4449 (March 23, 1995).

ARGUMENT

POINT I

THE ACT VIOLATES THE PRESENTMENT CLAUSE AND OFFENDS THE PRINCIPLES OF BICAMERALISM AND SEPARATION OF POWERS

The Constitution diffuses power on several levels. Power is divided between the federal and state sovereigns. Federal power is further diffused among three branches and legislative power is reposed in two separate chambers. This separation of powers among the different branches of the federal government is at "the heart of [the] Constitution." *Buckley v. Valeo*, 424 U.S. 1, 119 (1976).

The processes by which these branches bring their diffused power to bear on federal law is spelled out in detail in the Constitution. As set forth below, the Line Item Veto Act impermissibly tampers with these processes and fundamentally realigns the Constitutional diffusion of power.

A. *Congress May Not Legislatively Alter The Lawmaking Requirements of Article I.*

This Court has stated that any fundamental change in the constitutional framework "must come not by legislation adopted either by Congress or by an individual State, but rather -- as have other important changes in the electoral process -- through the amendment procedures set forth in Article V." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

Article I, § 1 vests federal legislative power exclusively in a bicameral Congress. The Presentment Clause, Art. I, § 7, cl. 2, prescribes the precise procedures by which that legislature may make law:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes law, be presented to the President of the United States: If he approves he shall sign it, but if

> not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become Law. . . .[2]

The Presentment Clause thus requires that a bill first be passed in identical form by both the House and the Senate and be presented to the President. The President must then either (i) sign the *entire* bill into law, (ii) veto the *entire* bill and send it back to Congress for reconsideration; or (iii) do nothing, in which case the *entire* bill becomes law after ten days, unless Congress recesses within that time. Art. I, § 7, cl. 2.

The legislative steps outlined in Art. I are not empty formalities; they are commands which simultaneously require and limit the participation of both Houses of Congress and the President in lawmaking. *See Chadha*, 462 U.S. at 958 n.22. As such, they may be altered only by constitutional amendment. In *Chadha*, this Court explained:

> Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions

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[2] Exceptions to this procedure are carefully spelled out in the Constitution. Examples include the Senate's confirmation of Presidential appointments pursuant to Article II, § 2, cl. 2; the Senate's ratification of treaties pursuant to Article II, § 2, cl. 2; the sole power of the House of Representatives to initiate impeachment proceedings pursuant to Article I, § 2, cl. 5; the sole power of the Senate to hold trials and to convict following impeachment charges by the House of Representatives pursuant to Article I, § 3, cl. 6; the role of Congress in the election of a President pursuant to Article II, § 1 and the Twelfth Amendment; and the proposal of a constitutional amendment for submission to the states pursuant to Article V. *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 955-56 and 955-56 n.21. Furthermore, each house has the power to act alone in handling certain specified matters. Article I, § 5.

> of the Congress and of the Executive in the legislative process ... [the] provisions of Art. I are integral parts of the constitutional design for the separation of powers.... "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. at 124. It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

Id. at 945-51.

The Line Item Veto Act purports to work essential changes to that "finely wrought and exhaustively considered procedure." Wholly apart from the damage such changes would do to the Nation, it is clear that they cannot be achieved by statute. To change the very structure of its government by permitting a line item veto, this Nation must amend its Constitution. It has not.

B. *The Line-Item Veto Upsets the Constitutional Balance of Power*

The Line Item Veto Act would upset the constitutional framework by transforming the President's limited power -- the veto -- into a qualitatively different and far greater one -- the unilateral power to determine what bills, or parts of bills, shall become the law of the land. Indeed, the very purpose of the Act is to give the President this dramatically expanded power to change enacted law, rather than merely to execute it. The Act therefore violates the Presentment Clause and scrambles the constitutional principals of separation of powers and bicameralism.

The Constitution decrees that, to make, modify or repeal federal law, a bill must be approved by both houses of Congress. That bill may then be signed into law *in its entirety*;

allowed to become law *in its entirety* by virtue of the President's inaction for ten days; or enacted into law *in its entirety* by both houses of Congress overriding a Presidential veto.

The language of Article I, § 7, cl. 2 makes plain that bills are to be approved or disapproved and reconsidered *in toto*, not in part. Consequently, if the President wishes to prevent a bill from becoming law the President must return it in its *entirety* to Congress for "consideration," or refuse to sign the *entire* bill[3]. The Constitution does not authorize the President to accept part of a bill and reject the rest. The *in toto* requirement prevents any of the participants in the legislative process from unilaterally revising that which has been approved by the others and ensures that the bill that becomes law is the same bill that was passed by both houses of Congress.

The Line Item Veto Act disregards this constitutional mandate by authorizing the President to sign an entire bill into law and then immediately repeal portions of it -- in other words, to exercise a partial veto. Congress cannot, constitutionally, give the President the power to veto portions of a bill presented by Congress and then sign others into law, as defendants and *amici* below conceded. (*See* Def. Mem. at 13-14; *Amici* Mem.[4] at 29.) The Line Item Veto Act, however, would accomplish the same result, allowing bills to become law in different form than that which majorities in the House and the Senate passed.

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[3] The Presentment Clause uses the terms "it" or "its" 12 times, refers to "the bill" twice, and uses the terms "reconsider" or "reconsideration" three times. From the context in which those terms are used, both "it," "its," and "the Bill" refer to "Every Bill which shall have passed the House of Representatives and the Senate."

[4] "Def. Mem." refers to Defendants' Memorandum of Points and Authorities In Support of Defendants' Alternative Motion for Summary Judgment and In Opposition to Plaintiffs' Motion for Summary Judgment" filed in the District Court. "*Amici* Mem." refers to the Memorandum *Amici Curiae* of the Senate and Bipartisan Legal Advisory Group of the House of Representatives submitted to the district court.

Additionally, the Line Item Veto Act would significantly change the political gravity of the federal government. The Constitution contemplates, and the history of our Nation has always involved, a process of give and take between members of Congress and between Congress and the White House. The Line Item Veto would undercut this tradition by providing the President with a new and powerful club to wield over each individual member of Congress -- the authority to cancel expenditures of particular interest to that member, even after both houses have passed them and the President has signed them -- unless the member accommodates the President's wishes in other matters. To be confident that any expenditure would survive a line item veto, each member of Congress would be obliged to horse-trade with the President directly, as well as with other members, during the process of Congressional consideration of each such expenditure. This would effectively transform the President into a superlegislator -- a result which would stand the Framers' "finely wrought" system on its head.

This reality also belies the notion that the line item veto is limited to budgetary matters. While the Act restricts the use of the line item veto to budgetary matters, it is obvious that the President could use the threat of a line item veto to coerce cooperation from individual members of Congress on non-budgetary issues.

Such an unprecedented accumulation of power in presidential hands would fundamentally alter the nature of the law-making dialogue between the branches and would, to some extent, transfer the ultimate power of the purse from the legislature to the executive.[5]

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[5] The Framers had feared combining the power of the purse with the power of the sword. *See* The Federalist No. 58 (J. Cooke ed. 1961)(J. Madison)("[t]his power over the purse may, in fact, be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people....").

C. *The Act Is An Unconstitutional Attempt to Delegate Congressional Authority.*

This Court has repeatedly held "the lawmaking function belongs to Congress, U.S. Const. Art. I, § 1, and may not be conveyed to another branch or entity." *Loving v. United States*, 116 S.Ct. 1737, 1744 (1996). Accordingly, "Congress manifestly is not permitted to abdicate or transfer to others the essential legislative functions with which it is . . . vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). "It is a breach of the National fundamental law if Congress gives up its Legislative power and transfers it to the President." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952)(Jackson, J., concurring)("the Executive, except for recommendation and veto, has no legislative power"); *Field v. Clark*, 143 U.S. 649, 692 (1891)("that Congress cannot delegate Legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution").

The Line Item Veto Act is, as the district court held, an unprecedented attempt by Congress to "alienate one of its basic functions" -- the power to rescind portions of legislation that have become the law of the land:

> the cancellation power conferred by the Act is indeed *revolutionary... Never before* has Congress attempted to give away the power to shape the content of a statute of the United States, as the Act purports to do. *As expansive as its delegations of power may have been in the past, none has gone so far as to transfer the function of repealing a provision of statutory law.*

(Op. at 31-32.)

Appellants and *amici* attempted below to characterize the Act as a delegation to the President of authority not to spend duly appropriated money subject to "intelligible principles"

articulated in the Act. This Court's holding in *J.W. Hampton*, however, illustrates that "intelligible principles" delegations differ significantly from this unconstitutional attempt by Congress to divest itself of lawmaking power. There, Congress had authorized the President to raise or lower import tariffs to equalize differences which, after factual investigation, the President found to exist between foreign and domestic production of similar products. 276 U.S. at 404-05. Because Congress lacked information about "changing conditions" necessary to make the required adjustments, the delegation was permitted "to give effect to the principle on which the statute proceeds." *Id.* Chief Justice Taft explained:

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'

Id. at 407, *quoting Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852).

Similarly, in *Field v. Clark*, 143 U.S. 649 (1891), Congress authorized the President to suspend temporarily the duty-free importing of specified goods if he found a country producing those goods imposed reciprocally unequal or unreasonable duties upon U.S. products. "Nothing involving the expediency or the just operation of such legislation was left to the determination of the President." *Id.* at 693. Congress determined when the law would be suspended and merely left it to the President to determine when, and if, those conditions arose. Faithfully adhering to this principle, this Court has from time to time permitted Congress to allow the Executive branch to provide technical expertise or determine whether certain specified conditions had occurred. *E.g. Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976)(President authorized to adjust petroleum imports by imposing license fees upon factual findings that specified

conditions had been met); *Yakus v. United States*, 321 U.S. 414 (1944) (executive may set price ceilings upon detailed factual determinations).

No such circumstance exists here. Congress is certainly able -- indeed, is constitutionally required -- to decide which spending items and tax benefits should be enacted into law and which should not. The Line Item Veto Act does not simply entitle the Executive branch to find facts, to discern contingencies or to apply expertise -- it invites the President to exercise discretion, unbound by any specified parameter, to retain parts of duly enacted legislation and to repeal others. In short, it is governed by no "intelligible principle" at all. This Court has never sanctioned so broad a congressional abdication of authority and should not now.

If the power of statutory repeal which the Act gives the President is ruled to be constitutional, Congress will be free to lay off on the President the power to rescind any existing law. There is no tenable constitutional distinction between Congress delegating its power to repeal appropriations or tax laws and delegating authority to repeal the civil rights laws, minimum wage laws, laws protecting health and the environment, or the criminal code.

POINT II

THE ACT VIOLATES THE RULES CLAUSE

The Rules Clause of the Constitution provides that "Each House may determine the rules of its proceedings ...." Art. I, § 5, cl. 2. The Line Item Veto Act is inconsistent with the Rules Clause for two reasons. First, one Congress is establishing procedural rules for the expedited consideration of disapproval bills by succeeding Congresses, thus precluding each chamber in succeeding Congresses from setting its own rules. Second, the Act allows the President to determine the items to be cancelled and thus limits the content of expedited disapproval bills. *See* 2 U.S.C. § 691.

The Rules Clause explicitly states that each house may determine its *own* rules of proceedings. Art. I, § 5, cl. 2. That

means that the membership of each chamber, sitting at the time, must have the ability to determine that chamber's internal rules. *Cf.* 103 Cong. Rec. 178 (1957)("the right of a current majority of the Senate at the beginning of a new Congress to adopt its own rules, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress.") Thus, one Congress cannot prevent a succeeding Congress from changing the rules of its proceedings. *See United States v. Ballin*, 144 U.S. 1, 5 (1892) ("[t]he power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal").

Thus, each chamber has the power and authority to set its own rules regarding a variety of internal matters[6]. The problem with legislation, such as the Act, which restricts the rule-making power of either chamber is that such legislation can only be abrogated by a subsequent piece of legislation. That second piece of legislation must be passed by *both* chambers and either approved by the President or enacted over the President's veto. This is inconsistent with the Rules Clause. Legislation, such as the Act, affecting the internal rule-making power of either chamber also results in one chamber of Congress exercising partial control over the internal rules of the other chamber. While the Constitution grants each chamber the power to set its own rules, that power can only be exercised in conformity with constitutional constraints. *See United States v. Ballin*, 144 U.S. at 5; *United States v. Smith*, 286 U.S. 6, 33 (1932).

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[6] *See e.g.*, Rules of the House of Representatives, 102nd Cong. *reprinted* in Congressional Quarterly's Guide to Congress, pp. 20-A to 62-A (4th ed. 1991); Senate Manual, 103rd Cong., 1st Sess. (1993)(Senate Document 103-1).

Several sections of the Act violate the Rules Clause by controlling Congress' internal rules and procedures as well as the form and content of bills.

Section 691d(a) specifies particular committees within both the House and Senate to which the President's special message shall be referred. Committee referral is a matter of the internal organization and procedures of each chamber and the Act's attempt to establish matters of committee referral for succeeding congresses violates the Rules Clause.

Section 691d(b) sets forth certain time parameters within which Congress must act upon any expedited disapproval bill. Such time parameters prevent succeeding chambers from setting their own calendar and determining when and which bills shall be heard or voted upon, another clear violation of the Rules Clause.

Sections 691d(d) and (e), which deal with consideration in the House and the Senate, respectively, also violate the Rules Clause by controlling Congress' internal rules and procedures. Subsection (d), for example, limits debate in the House on disapproval bills, precludes motions to reconsider a vote and restricts the making of other motions. Subsection (e) imposes similar limitations on proceedings in the Senate.

Finally, section 691d(f) infringes on the ability of each chamber to determine its own rules of proceedings with respect to a conference report. In connection with the House's consideration of a conference report, subsection (f)(2) limits debates and debatable motions and a motion to recommit is not in order. Similarly, in connection with the Senate's consideration of a conference report, subsection f(3) limits debate and a motion to recommit is not in order. Finally, subsection (f)(4) places limits on the contents of certain bills when there are disagreements in amendments to disapproval bills and certain other amendments in the nature of a substitute.

CONCLUSION

The Line Item Veto Act transfers to the President the fundamental legislative power of deciding what programs should exist. For over 200 years our system of government, as framed by the Constitution, has been just the opposite. The purpose of the Line Item Veto Act is a truly revolutionary attempt to spare Congress difficult decisions about which programs should exist by having the President make those decisions in its stead. Upholding this effort would place the entire system of federal lawmaking, and the separation of powers itself, in grave jeopardy. This Court must, on this occasion, protect Congress from itself, and thereby protect the Nation.

Respectfully submitted,

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37

TABLE OF CONTENTS

	Page
Interest of Amici	1
Summary of Argument	2
Argument:	
I. The Line Item Veto Act Builds on Congress's Long-standing Practice of Giving Spending Discretion to the Executive	4
A. Since 1789, Congress Has Given the Executive Discretion Over the Expenditure of Appropriated Funds	5
B. This Century Congress Has Periodically Given the Executive Enhanced Spending Discretion to Help Achieve Congress's Overall Goals	8
C. On Occasion, the Executive Branch Has Sought to Exercise Greater Spending Authority Than Congress Has Granted	12
D. Congress Legislated Firm Controls on Executive Spending Discretion in the Impoundment Control Act	15
E. For Over a Decade, Congress Has Delegated Particular Authority Over Spending to Achieve Deficit Reduction	16
II. The Line Item Veto Act Is a Constitutional Exercise of the Appropriation Power	17
A. The Line Item Veto Act Conforms With Article I	18
B. The Line Item Veto Act Assigns Delegable Responsibility to the President	21
C. The Line Item Veto Act Comports With the Doctrine Against Undue Delegation	26
Conclusion	30

Page

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Cases:

Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (three-judge court) 29, 30
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Bowsher v. Synar, 478 U.S. 714 (1986) 16
The Brig Aurora, 11 U.S. (7 Cranch) 382 (1813) 4, 24
Brotherhood of Railroad Trainmen v. Baltimore & O.R.R., 331 U.S. 519 (1947) 19
Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937) 22, 23, 24
City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987) 16
Davis v. United States, 411 U.S. 233 (1973) 26
Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976) 29
Field v. Clark, 143 U.S. 649 (1892) 4, 22, 24, 25, 29
Flast v. Cohen, 392 U.S. 83 (1968) 2
Goldwater v. Carter, 444 U.S. 996 (1979) 2
INS v. Chadha, 462 U.S. 919 (1983) 3, 15, 18, 19, 20, 21
INS v. National Center for Immigrants' Rights, 502 U.S. 183 (1991) 19
Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980) 14
J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) 4, 22, 27
La Abra Silver Mining Co. v. United States, 175 U.S. 423 (1899) 19–20
Lincoln v. Vigil, 508 U.S. 182 (1993) 23
Local 2677, A.F.G.E. v. Phillips, 358 F. Supp. 60 (D.D.C. 1973) 15
Loving v. United States, 116 S. Ct. 1737 (1996) 22, 26, 30
Minnesota v. Weinberger, 359 F. Supp. 789 (D. Minn. 1973) 15

Page

Cases—Continued
Mistretta v. United States, 488 U.S. 361 (1989) 4, 26, 27, 30
National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) 14
OPM v. Richmond, 496 U.S. 414 (1990) 22
Pealo v. Farmers Home Admin., 361 F. Supp. 1320 (D.D.C. 1973) 15
Pennsylvania v. Lynn, 501 F.2d 848 (D.C. Cir. 1974) 15
Pennsylvania v. Weinberger, 367 F. Supp. 1378 (D.D.C. 1973) 15
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Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 26
Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989) 4, 20, 22
State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973) 15
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Train v. City of New York, 420 U.S. 35 (1975) 14
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 24
United States v. Smith, 286 U.S. 6 (1932) 2
Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) 2
Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825) ... 30
Yakus v. United States, 321 U.S. 414 (1944) 26, 30

Constitution and Statutes:
U.S. Const.:
Art. I, sec. 7, cl. 2 ..... 1, 20
Art. I, sec. 9, cl. 7 ..... 5, 22
Act of Sept. 29, 1789, ch. 23, 1 Stat. 95 5
Act of Mar. 26, 1790, ch. 4, 1 Stat. 104 ..... 5, 6
Act of Feb. 11, 1791, ch. 6, 1 Stat. 190 6

Page

Constitution and Statutes—Continued
Act of Feb. 28, 1803, ch. 11, 2 Stat. 206 6
Act of Mar. 3, 1809, ch. 28, 2 Stat. 535 7
Act of Mar. 3, 1815, ch. 77, 3 Stat. 224 24
Act of May 1, 1820, ch. 52, 3 Stat. 567 7
Act of May 31, 1830, ch. 219, 4 Stat. 425 25
Act of June 30, 1834, ch. 171, 4 Stat. 742 7
Act of July 2, 1836, ch. 268, 5 Stat. 77 7
Act of Aug. 26, 1842, ch. 202, 5 Stat. 523 7
Act of Feb. 12, 1868, ch. 8, 15 Stat. 35 7
Act of July 12, 1870, ch. 251, 16 Stat. 230 8
Act of June 3, 1896, ch. 314, 29 Stat. 202 7
Act of Mar. 3, 1905, ch. 1484, 33 Stat. 1214 8
Act of June 30, 1932, ch. 314, 47 Stat. 382 7
Act of Mar. 3, 1933, ch. 212, 47 Stat. 1489 11
Act of July 13, 1943, ch. 236, 57 Stat. 560 9
Act of Sept. 6, 1950, ch. 896, 64 Stat. 595 ..... 10, 11
Pub. L. No. 89–554, 80 Stat. 378 (1966) 11
Pub. L. No. 91–47, 83 Stat. 49 (1969) 12
Pub. L. No. 91–305, 84 Stat. 376 (1970) 12
Pub. L. No. 100–119, 101 Stat. 754 (1987) 16
Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99–177, tit. II, 99 Stat. 1038 .. 16, 25
Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100–119, tit. I, 101 Stat. 754 16
Budget and Accounting Act, 1921, ch. 18, 42 Stat. 20 9
Budget Enforcement Act of 1990, Pub. L. No. 101–508, tit. XIII, 104 Stat. 1388–573 17
Economic Stabilization Act of 1970, Pub. L. No. 91–379, tit. II, 84 Stat. 799 30
Emergency Relief Appropriation Act of 1937, ch. 401, tit. I, 50 Stat. 352 23
Impoundment Control Act of 1974, Pub. L. No. 93–344, tit. X, 88 Stat. 332, codified as amended at 2 U.S.C. §§ 681 *et seq.* 15
§§1011–1013 15
§1012(b) 15
§1013 15
§1017 15

Page

Constitution and Statutes—Continued
Impoundment Control Act of 1974, Pub. L. No. 93–344, tit. X, 88 Stat. 332, codified as amended at 2 U.S.C. §§ 681 *et seq.*—*Continued*
2 U.S.C. §684(b) (1994) 16
§1021(a), 2 U.S.C. §691(a) 18, 27
§1021(a)(B), 2 U.S.C. §691(a)(B) 21
§1021(a)(2), 2 U.S.C. §691(a)(2) 28
§1021(b), 2 U.S.C. §691(b) 27
§1022(b), 2 U.S.C. §691a(b) 27
§1022(c)(2), 2 U.S.C. §691a(c)(2) 20
§1024, 2 U.S.C. §691c 28
§1025, 2 U.S.C. §691d 20
§1026(4)(A), 2 U.S.C. §691e(4)(A) 28
§1026(5), 2 U.S.C. §691e(5) 28
§1026(8), 2 U.S.C. §691e(8) 28
Line Item Veto Act of 1996, Pub. L. No. 104–130, 110 Stat. 1200, to be codified at 2 U.S.C. §§691 *et seq.* 1
§5, 110 Stat. 1212, 2 U.S.C. §691 note 28
Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009 (1996) 7
Reorganization Act of 1939, ch. 36, 53 Stat. 561 11
Reorganization Act of 1945, ch. 582, 59 Stat. 613 11
Reorganization Act of 1949, ch. 226, 63 Stat. 203 11
Revenue and Expenditure Control Act of 1968, Pub. L. No. 90–364, 82 Stat. 251 12
2 U.S.C. § 288e (1994) 1
2 U.S.C. § 288*l*(a) (1994) 1
5 U.S.C. § 905, historical and revision notes (1994) ... 11
18 U.S.C. § 3771 (1982) 26
28 U.S.C. § 2072(b) (1994) 26
Congressional Materials:
H.R. 78, 102d Cong. (1991) 17
H.R. 2164, 102d Cong. (1991) 17
H.J. Res. 4, 103d Cong. (1993) 17
H.J. Res. 6, 104th Cong. (1995) 17
S. 137, 104th Cong. (1995) 17
S. 206, 104th Cong. (1995) 17
S. 238, 104th Cong. (1995) 17

Page

Congressional Materials—Continued
S. Res. 21, 105th Cong. (1997), 143 Cong. Rec. S619 (daily ed. Jan. 22, 1997) 1
H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. (1996) 21, 27, 28
H.R. Rep. No. 1797, 81st Cong., 2d Sess. (1950) 10, 11
3 Annals of Cong. (1793) 7, 23
13 Annals of Cong. (1803) 6
14 Annals of Cong. (1804) 6
Cong. Globe, 36th Cong., 2d Sess. 1177 (1861) 13
77 Cong. Rec. 5707–08 (1933) 11
89 Cong. Rec. 10362 (1943) 10
115 Cong. Rec. 21277–78 (1969) 12
Proposed Rescissions of Amounts Placed in Reserve, H.R. Doc. No. 182, 82d Cong., 1st Sess. (1951) 11
Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. (1971) 10, 13
First Supplemental National Defense Appropriation Bill for 1944: Hearings Before a Subcomm. of the Senate Comm. on Appropriations, 78th Cong., 1st Sess. (1943) 9
House of Representatives Rule I(11) 1
Executive Materials:
3 Stat. app. 1, procl. 3–7 (1818–21) 25
Reorg. Plan No. 1 of 1953, *reprinted in* 67 Stat. 631 12
Reorg. Plan No. 3 of 1970, *reprinted in* 84 Stat. 2086 12
Messages and Papers of the Presidents (James D. Richardson, ed., 1897) 6, 13
1933 Pub. Papers 11
1945 Pub. Papers 10
Letter from President Roosevelt to Senator Russell (Aug. 18, 1942), *reprinted in part in First Supplemental National Defense Appropriation Bill for 1944: Hearings Before a Subcomm. of the Senate Comm. on Appropriations,* 78th Cong., 1st Sess. 739 (1943) 9
21 Op. Att'y Gen. 391 (1896) 8

Page

Executive Materials—Continued
21 Op. Att'y Gen. 414 (1896) 8
22 Op. Att'y Gen. 295 (1899) 8
42 Op. Att'y Gen. 347 (1967) 11
Memorandum of Ass't Att'y Gen. William H. Rehnquist, Re Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969), *reprinted in Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 279 (1971) 13, 23
U.S. Bureau of the Budget, *Circulars*, "First Budget Regulations," Budget Circular No. 4 (July 1, 1921) 9
Miscellaneous:
Henry P. Seidemann, *The Preparation of the National Budget*, 113 Annals Am. Acad. Pol. & Soc. Sci. 40 (1924) 9
Joseph Story, 2 *Commentaries on the Constitution of the United States* (Fred B. Rothman & Co. 1991) (1833) 22

JOINT BRIEF OF THE UNITED STATES SENATE AND THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICI CURIAE FOR REVERSAL

INTEREST OF AMICI

Congress enacted the Line Item Veto Act, Pub. L. No. 104–130, 110 Stat. 1200 (1996) (2 U.S.C. §§691 *et seq.*), as an extension of the Impoundment Control Act of 1974, which established procedures for the President and Congress to defer or rescind previously enacted appropriation provisions. Despite its name, the Act does not give the President any authority to veto items in proposed legislation. Rather, the Act enhances the President's authority, through 2004, to rescind deficit-increasing items in enacted laws, subject to Congress's ultimate control. The district court agreed with appellees' contention that this authority transgresses the Constitution's Presentment Clause, art. I, §7, cl. 2, by letting the President repeal laws without action by Congress. Appellants' Appendix ("App. App.") at 21a–22a, 25a–26a. This appearance as amici curiae [1] explains the basis for Congress's conviction that the Act comports with the Constitution's lawmaking

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[1] Title 2 U.S.C. §288e authorizes the Senate to direct its Legal Counsel to appear as amicus curiae in its name "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution . . . are placed in issue." *See* S. Res. 21, 105th Cong. (1997), 143 Cong. Rec. S619 (daily ed. Jan. 22, 1997) (directing Senate appearance in this case). Permission to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. §288*l*(a). The Bipartisan Legal Advisory Group of the House of Representatives, comprising the Speaker and Majority and Minority Leaders and Whips, traditionally represents the interests and views of the House in judicial proceedings. *See* House of Representatives Rule I(11). The parties' written consents to the House Bipartisan Legal Advisory Group's appearance have been filed with the Court.

procedures and the separation of powers that animates those requirements.[2]

SUMMARY OF ARGUMENT

I. The Line Item Veto Act builds upon over two centuries of congressional delegation to the Executive of discretionary control over spending. From the first appropriation laws, which set ceilings on Executive spending, Congress has repeatedly appropriated funds without mandating that they be spent. In addition to delegating spending discretion in individual appropriation measures, Congress has enacted across-the-board legislation authorizing the Executive to transfer, reduce, or withhold appropriations, initially for purposes of economy and management, and more recently in furtherance of Congress's broad fiscal policies. When disputes have arisen over

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[2] Amici express no position on the standing issue raised by appellants. However, amici note their view that this case presents only the question whether, under the Act's judicial review provision, plaintiffs have constitutional standing as individual Members of Congress. Distinct and significant considerations could arise in a case in which either House, or the entire Congress, sought to invoke the courts' jurisdiction to protect its constitutional prerogatives and duties against intrusion by the Executive or a private party. *See, e.g., United States v. Smith*, 286 U.S. 6 (1932) (adjudicating Senate challenge to presidential appointment); *Barnes v. Kline*, 759 F.2d 21, 25–30 (D.C. Cir. 1985) (holding Senate has standing to assert injury from President's use of "pocket veto"), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17 (D.D.C.) (enforcing Senate committee subpoena), *emergency motion for stay pending appeal denied*, No. 94–5023, Order (D.C. Cir. Feb. 18, 1994), *application for stay denied*, 510 U.S. 1319 (1994) (Rehnquist, C.J., in chambers). Questions of standing "contain[ ] beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." *Flast v. Cohen*, 392 U.S. 83, 94 (1968). In a complex area of law that "has not been defined with complete consistency," *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982), the Court should decide only the standing question necessarily presented by this case, as different separation of powers concerns may well predominate when an entire body of Congress is seeking to protect its rights. *See Goldwater v. Carter*, 444 U.S. 996, 997–98, 1001–02 (1979) (Powell, J., concurring in judgment).

whether the Executive could withhold particular funds, as in the impoundment controversy of the 1970s, all three branches have understood that the issue of how much spending discretion the Executive has is a legislative question subject to Congress's determination. Following the 1970s controversy, Congress enacted the Impoundment Control Act, which constrained Executive rescission of appropriated funds. Now, after two decades of struggle with persistent budget deficits, Congress has amended the Impoundment Control Act to enhance the President's authority to rescind spending, through circumscribed discretion to cancel appropriations within five days of their enactment.

II. The cancellation authority granted to the President in the Line Item Veto Act does not alter the lawmaking process or give the President lawmaking power contrary to Article I, for his sole authority remains to execute the laws in fulfillment of Congress's deficit-reduction policy. The Act fully comports with the bicameralism and presentation requirements of Article I, section 7, as both the Act itself and all laws subject to the Act will have been agreed to by both Houses and signed by the President. The President's approval of a measure subject to the Act, in accordance with the Presentment Clause, constitutes the clear line of demarcation separating the President's Article I duties from his Article II duties. Once the President has signed a bill into law, the lawmaking process is complete. At that moment, when a bill subject to the Act becomes a law, all three legislative actors will have agreed to make the measure's spending or revenue items permissive. Thus, Congress's delegation to the President of post-enactment cancellation authority does not implicate the lawmaking procedures of Article I. Any cancellation will occur as an executive action, limited by a duly enacted statute and in conformance with Congress's will. *See INS v. Chadha,* 462 U.S. 919, 953 n.16 (1983).

The constitutionality of the Act's cancellation authority presents only the question whether the discretion vested in the President violates the doctrine against undue dele-

gation. That the authority is delegated in the areas of spending and taxation is immaterial, for delegation of the "taxing power is subject to no [greater] constitutional scrutiny" than are delegations of other powers. *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989). Nor does the fact that the cancellation authority permits the President in effect to nullify appropriation provisions render the authority nondelegable. This Court has upheld similar authority to alter the force of statutes since 1813. *See Field v. Clark*, 143 U.S. 649, 682–83 (1892) (citing *The Brig Aurora*, 11 U.S. (7 Cranch) 382, 388 (1813)).

The Court should sustain Congress's delegation of cancellation authority to the President because Congress has "'la[id] down by legislative act an intelligible principle,'" *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))—deficit reduction—to guide the President's discretion. Further, Congress has prescribed specific determinations and assessments the President must make. Congress has also meaningfully constrained the President's discretion by excluding from his cancellation authority two-thirds of the budget and all substantive legal provisions, and by requiring cancellations to be all-or-nothing, within five days after enactment, irreversible, and devoted entirely to deficit reduction. These attributes narrow the President's discretion and are akin to features of previously sustained delegations. In light of Congress's long-recognized ability to appropriate permissively, the Court should uphold the Act's delegation to the President of this carefully limited authority to cancel spending.

ARGUMENT

I. THE LINE ITEM VETO ACT BUILDS ON CONGRESS'S LONGSTANDING PRACTICE OF GIVING SPENDING DISCRETION TO THE EXECUTIVE

Congress's delegation of authority to cancel spending builds upon a long history of delegation of discretionary

control over appropriated funds that traces from the first appropriation laws Congress enacted under the Constitution.

A. Since 1789, Congress Has Given the Executive Discretion Over the Expenditure of Appropriated Funds

The Constitution provides that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 9, cl. 7. From its initial exercise of the appropriation power, Congress has acted upon its understanding that, while the Appropriations Clause prohibits the expenditure of federal funds in the absence of a congressional appropriation, an appropriation need not compel the expenditure of appropriated funds. Instead, Congress may choose to make an appropriation permissive.

Congress's first appropriation law, funding the original Executive departments, delegated significant discretion not to spend appropriated funds, providing:

> That there be appropriated for the service of the present year . . . [a] sum *not exceeding* two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government [and] a sum *not exceeding* one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war.

Act of Sept. 29, 1789, ch. 23, §1, 1 Stat. 95 (emphasis added). The next year Congress funded much of the government under similarly flexible appropriations "not exceeding" specified amounts, in one case granting the President unbridled discretion "to draw from the treasury a sum not exceeding ten thousand dollars, for the purpose of defraying the contingent charges of government." Act of Mar. 26, 1790, ch. 4, §§ 1, 3, 1 Stat. 104, 105. That Congress intended these laws setting only a ceiling on expenditures to give the Executive discretion to spend less than the sum appropriated is evident by contrasting the "not exceeding" language with a contemporaneous provision in which Congress directed that "payment of the fol-

lowing sums . . . is hereby authorized *and intended to be made.*" *Id.*, § 5, 1 Stat. 105 (emphasis added). By appropriating funds "not exceeding" a fixed amount, early Congresses manifested recognition of their constitutional authority to delegate to the Executive discretion to spend funds within whatever range Congress set by law.

In the third annual appropriation law, in 1791, Congress not only continued to give the Executive discretion by erecting spending ceilings for much of the government, Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190, but also confirmed that it intended the Executive to use that discretion, by validating the Executive's past expenditure of less than the appropriated levels: sums appropriated in the 1791 law were to be drawn in part from "such surpluses as may remain in the treasury, after satisfying the purposes for which appropriations were made, by the [first two appropriation acts]." *Id.*

At the outset of the 19th century, as the Nation's needs rapidly expanded, Congress gave the Executive even greater flexibility over spending. In 1803, Congress appropriated $50,000 for the President to build "not exceeding fifteen gun boats . . . for such purposes as in his opinion the public service may require." Act of Feb. 28, 1803, ch. 11, § 3, 2 Stat. 206. President Jefferson determined that the "favorable and peaceable turn of affairs on the Mississippi" brought about by the Louisiana Purchase and reopening of the Port of New Orleans had mitigated the need for the vessels, and he reserved the funds until the best models were selected the following year. 13 Annals of Cong. 14 (1803); 14 Annals of Cong. 13 (1804). "The same issue of events" on the Mississippi also "effected by happier means" the purpose of a $1.5 million appropriation, which Jefferson accordingly declined to spend. 13 Annals of Cong. 14; *see also* 1 *Messages and Papers of the Presidents* 382–83, 405, 421 (James D. Richardson, ed., 1897) (Jefferson returning other unused funds).

Congress also early began delegating significant spending discretion by authorizing the transfer of funds be-

tween appropriation accounts. In 1793, Treasury Secretary Alexander Hamilton's execution of an appropriation law had prompted debate whether, in James Madison's words, the Executive had inherent constitutional "discretion to be implied in the trust of executing the laws" to "apply the excess of one fund to the aid of a deficient one," or whether such action depended on "special permission of the law" appropriating the funds. 3 Annals of Cong. 938 (1793). In 1809, Congress authorized the President, "if in his opinion necessary for the public service," to transfer appropriations within a department during a congressional recess. Act of Mar. 3, 1809, ch. 28, § 1, 2 Stat. 535, 535–36. In 1820, Congress amended this authorization to give the President discretion to transfer appropriations within the War and Navy Departments at any time. *See* Act of May 1, 1820, ch. 52, § 5, 3 Stat. 567, 568. Congress continued periodically to grant the President discretion to transfer appropriations until 1868,[3] when Congress repealed all transfer authority and provided that "no money appropriated for one purpose shall hereafter be used for any other purpose."[4]

The recognition of Congress's constitutional authority to delegate discretion over spending persisted through the 19th century. In 1896, for example, Congress authorized the Secretary of War to expend "not exceeding fifty thousand dollars, or so much thereof as may be necessary," to improve the Mississippi River channel and bank. Act of June 3, 1896, ch. 314, 29 Stat. 202, 229. Attorney General

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[3] *See* Act of June 30, 1834, ch. 171, 4 Stat. 742; Act of July 2, 1836, ch. 268, § 2, 5 Stat. 77, 78–79; Act of Aug. 26, 1842, ch. 202, § 23, 5 Stat. 523, 533.

[4] Act of Feb. 12, 1868, ch. 8, § 2, 15 Stat. 35, 36. In the 20th century, Congress again authorized the transfer of discrete appropriations. *See, e.g.*, Act of June 30, 1932, ch. 314, § 317, 47 Stat. 382, 411 (authorizing transfer during year of up to 12% of any appropriation within same department); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009, 3009–88 (1996) (§ 8005) (authorizing transfer under certain conditions of up to $2 billion of Defense Department funds); *id.*, 110 Stat. 3009–262 (§ 306) (authorizing transfer under certain conditions of Education Department funds).

Harmon advised the Secretary "that the permissive form was here used with the deliberate intention of leaving to your judgment the question whether any of the sum named should be expended; and if so, how much." 21 Op. Att'y Gen. 391, 392 (1896). The Attorney General instructed the Secretary "to proceed with the expenditure authorized if, in your judgment, an improvement of that condition may fairly be expected to result. Otherwise you are left at liberty to leave the appropriation unexpended."[5]

B. This Century Congress Has Periodically Given the Executive Enhanced Spending Discretion to Help Achieve Congress's Overall Goals

This century, as the growth of the federal budget and the economy led to increased governmental responsibility for managing the economy through fiscal policy, Congress began extending to the Executive broader spending discretion to achieve Congress's budget goals. The first purpose for which Congress conferred general authority to manage spending was to facilitate adherence to Congress's mandated spending limitations. As early as 1870 Congress had sought to enforce compliance with its appropriation ceilings through the Antideficiency Act, which made it unlawful for the Executive "to expend in any one fiscal year any sum in excess of appropriations." Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251. Three decades later, Congress recognized that sound management required giving the Executive the ability to control the pace of spending. Accordingly, in 1905, Congress amended the Antideficiency Act to authorize agencies to apportion their appropriations on a monthly or other regular basis, so as to avoid the need for deficiency appropriations late in the fiscal year. Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257–58. This across-the-board

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[5] *Id.*; *see also* 21 Op. Att'y Gen. 414, 415–16 (1896) (same); *compare* 22 Op. Att'y Gen. 295, 297 (1899) (construing another appropriation as mandatory).

measure thus authorized Executive agencies to exercise a measure of control throughout the budget.

Fifteen years later, the first Director of the Bureau of the Budget, acting under the new Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20, directed departments to treat appropriations as spending ceilings and to establish "General Reserves" by saving unnecessary expenditures. *See* U.S. Bureau of the Budget, *Circulars*, "First Budget Regulations," Budget Circular No. 4 (July 1, 1921). Each department was to identify "indispensable" portions of appropriations. After presidential review, the remaining amount, or General Reserve, was not available for obligation. *See id.* President Harding affirmed the understanding that Congress intended appropriations as an upper limit on spending and that departments should effect savings by setting aside a "reasonable reserve" from each appropriation.[6] During World War II, President Roosevelt explained his use of "good management and the practice of commonsense economy" to direct agencies to generate reserves where possible, while recognizing that Congress had delegated no authority to withhold funds "to set aside or nullify the expressed will of Congress" or "substitute for item or blanket veto power."[7]

Congress responded to the need for Executive flexibility during the War by selectively delegating enhanced authority to withhold appropriated funds. For example, Congress authorized the Executive to withhold national highway funds if "the War Production Board shall certify that the use of critical material for additional highway construction would impede the conduct of the war." Act of July 13, 1943, ch. 236, §9, 57 Stat. 560, 563. Then-Senator Harry Truman observed,

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[6] *See* Henry P. Seidemann, *The Preparation of the National Budget*, 113 Annals Am. Acad. Pol. & Soc. Sci. 40, 43 (1924) (reporting Harding's remarks).

[7] Letter from President Roosevelt to Senator Russell (Aug. 18, 1942), *reprinted in part in First Supplemental National Defense Appropriation Bill for 1944: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 78th Cong., 1st Sess. 739 (1943).

> When the Congress appropriates funds it gives the executive branch an authority to incur obligations. Certainly none of us hold that we give a mandate to expend the funds appropriated. We expect the funds to be used only where needed, and not in excess of the amount appropriated, to carry out some phase of law.

89 Cong. Rec. 10362 (1943). At the end of the War, then-President Truman followed this principle in declining to spend funds appropriated for veterans hospitals until after veterans had returned, so that the hospitals could be built where veterans had settled.[8]

In 1950 Congress again amended the Antideficiency Act to give express approval to the Executive's discretionary control over spending consistent with Congress's legislated policy objectives. Congress provided: "In apportioning any appropriation, reserves may be established to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the [appropriation]." Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 595, 765–66. Once the Executive determined that particular reserves "will not be required to carry out the purposes of the appropriation," it was to recommend their rescission. *Id.*, 64 Stat. 766.

In proposing this amendment, the House Appropriations Committee had stated that Congress "decides the maximum amounts which must be appropriated for . . . various activities" and that "[a]ppropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity." H.R. Rep. No. 1797, 81st Cong., 2d Sess. 9 (1950). Congress intended to make the Executive responsible "for

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[8] *See Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 84–85 (1971) (testimony of William J. Driver, former Administrator of Veterans' Affairs); *see also* 1945 Pub. Papers 238 (Truman withholding decision on location of VA hospitals).

rendering all necessary service with the smallest amount possible within the ceiling." *Id.* Acting Attorney General Ramsey Clark later called this description "[t]he classic exposition" of a fundamental principle of appropriations law: "an appropriation act in itself does not constitute a mandate to spend." 42 Op. Att'y Gen. 347, 350 (1967).

The 1950 appropriation law also authorized the Executive, for the first time, to control spending to serve Congress's broad fiscal policy goals: Congress directed the Executive to use the Antideficiency Act's new reserve authority to reduce total spending for the year by at least $550 million below appropriated levels, so long as the reductions not "impair[] national defense." Act of Sept. 6, 1950, ch. 896, § 1214, 64 Stat. 768. To accomplish the required reduction, President Truman reserved and recommended the rescission of funds for 150 separate items. *See Proposed Rescissions of Amounts Placed in Reserve*, H.R. Doc. No. 182, 82d Cong., 1st Sess. 3–8 (1951).

As an additional tool for reducing expenditures, on a number of occasions this century Congress has given the Executive express authority to override Congress's spending decisions and rescind appropriations. Congress's first such delegation came through broad authority to reorganize the Executive branch. In 1933, Congress gave the President latitude, subject only to a report-and-wait requirement, to abolish, consolidate, or transfer executive agencies and functions, with savings in appropriations to be "impounded and returned to the Treasury." Act of Mar. 3, 1933, ch. 212, § 16, 47 Stat. 1489, 1517–19. Within months, President Roosevelt canceled more than $25 million of appropriations by terminating and reorganizing agencies. 1933 Pub. Papers 222–25; 77 Cong. Rec. 5707–08 (1933). Over the next fifty years, Presidents exercised similar statutory authority (subject to legislative veto)[9] to create agencies such as the Department of Health, Edu-

[9] *E.g.*, Reorganization Act of 1939, ch. 36, 53 Stat. 561; Reorganization Act of 1945, ch. 582, 59 Stat. 613; Reorganization Act of 1949, ch. 226, 63 Stat. 203; Pub. L. No. 89–554, 80 Stat. 378, 394 (1966); *see* 5 U.S.C. § 905, historical and revision notes.

cation, and Welfare and the Environmental Protection Agency, using other agencies' appropriations.[10]

During the late 1960s, when Vietnam War expenditures and domestic needs combined to create a fiscal crisis, Congress began delegating to the President even greater control over spending, in the form of annual spending ceilings. Beginning with fiscal year 1969, Congress enacted statutory limits requiring the Executive to hold total spending and new obligations below appropriated levels by $6 and $10 billion, respectively. Revenue and Expenditure Control Act of 1968, Pub. L. No. 90–364, §§ 202–203, 82 Stat. 251, 271–72. Excepting only four categories (the Vietnam War, debt service, veterans' and social security benefits), Congress authorized the President unilaterally to reduce or eliminate spending items as he saw fit to achieve the reductions. *Id.* Congress provided that the amounts of obligations the President chose to reserve under this authority "are hereby rescinded." *Id.*, § 203(b), 82 Stat. 272. The President used this discretionary authority to save billions of dollars in expenditures.[11]

C. On Occasion, the Executive Branch Has Sought to Exercise Greater Spending Authority Than Congress Has Granted

Congress's refusal to give the President similar spending discretion beyond 1971 set the stage for conflict over the President's authority to decline to spend appropriated funds. In addressing these conflicts, all three branches manifested their understanding that the issue of how much discretion the Executive has over expenditures is entirely a legislative matter for Congress to determine in exercising its appropriation power.

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[10] *See* Reorg. Plan No. 1 of 1953, *reprinted in* 67 Stat. 631–32; Reorg. Plan No. 3 of 1970, *reprinted in* 84 Stat. 2086–89.

[11] *See* 115 Cong. Rec. 21277–78 (1969). Congress gave the President similar authority the two succeeding years. Pub. L. No. 91–47, § 401, 83 Stat. 49, 82–83 (1969); Pub. L. No. 91–305, §§ 401, 501, 84 Stat. 376, 405–07 (1970).

Episodic disputes over Executive non-spending had surfaced from the mid-1800s. In 1861 Senator Stephen Douglas had objected to President Buchanan's failure to implement an appropriation to build a custom-house in Springfield, Illinois, complaining that "a hostile Executive" had "refused to obey the law." Cong. Globe, 36th Cong., 2d Sess. 1177 (1861). President Grant threatened in 1876 to disregard appropriation provisions, declaring in signing a rivers and harbors bill that he would refuse to spend money appropriated "for works of purely private or local interest." 9 *Messages and Papers of the Presidents* 4331. He justified his refusal by asserting that the objectionable appropriations were not obligatory. *Id.*

The issue of presidential authority over appropriations came to a head under President Nixon. In 1969, his Administration considered withholding educational grants on the theory that the President had inherent constitutional authority to refuse to spend appropriated funds. The Justice Department's Office of Legal Counsel, headed by then-Assistant Attorney General William H. Rehnquist, rejected this theory: "[W]e conclude that the President does not have a constitutional right to impound [appropriated] funds notwithstanding a Congressional direction that they be spent."[12] While agreeing with Acting Attorney General Clark "that an appropriation act permits but does not require the executive branch to spend funds," the Office of Legal Counsel opined that "this is basically a rule of construction," subservient to Congress's will with respect to each individual appropriation: Whether the Executive has discretion over a particular spending measure is solely an issue of congressional intent, and the President has whatever discretion Congress has given.[13]

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[12] Memorandum of Ass't Att'y Gen. William H. Rehnquist, Re Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969), *reprinted in Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 279, 282 (1971) (hereinafter "OLC Memo.").

[13] *Id.*

In the years following, Congress determined not to give the President the discretion it had conferred through prior annual ceilings on total government spending. Nevertheless, the Nixon Administration embarked on an ambitious course of spending cuts, impounding funds appropriated for a wide variety of programs, including housing, education, and environmental programs, notwithstanding the Office of Legal Counsel opinion. As a result, in the early 1970s, courts in scores of cases were required to determine whether the Executive had the authority it asserted not to spend appropriated funds.

To resolve these cases, the courts uniformly looked to Congress's intent, upholding Executive refusals to spend if Congress had conferred such discretion, but invalidating impoundments and ordering funds released when Congress had intended the funds to be spent. In *Train v. City of New York*, 420 U.S. 35 (1975), this Court interpreted a statutory mandate that sums authorized for sewage facilities "shall be allotted," *id.* at 42, to require the Executive to release all funds authorized by Congress. In rejecting the Executive's assertion that Congress had legislated "a maximum, but no minimum," *id.* at 43, the Court made no suggestion that, had Congress delegated "limitless power to withhold funds from allotment and obligation," *id.* at 46, this would have been constitutionally improper. Nor did the Court find it necessary to apply the principle of construing delegations "narrowly to avoid constitutional problems." *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974); *see Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (opinion of Stevens, J.). Rather, the Court used straightforward statutory construction to conclude that Congress had intended to confer no such discretion. *Train*, 420 U.S. at 42–49. Lower courts reached like results in scores of cases also without a hint that such delegations presented any issue other than statutory construction, consistently recognizing that the Executive had as much or as little authority to withhold appropriated

funds as Congress had granted.[14] In the one case in which the District of Columbia Circuit found that Congress *had* authorized the Executive to withhold appropriated funds, the court similarly evidenced no concern that such discretion raised a constitutional issue. *Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974).

D. Congress Legislated Firm Controls on Executive Spending Discretion in the Impoundment Control Act

The frequency with which the Nixon Administration asserted discretion to withhold funds that Congress had intended be spent led Congress to enact legislation to ensure that the Executive would withhold only appropriations that Congress had intended to be permissive. Impoundment Control Act of 1974 ("ICA"), Pub. L. No. 93–344, tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. §§ 681–688). Through the Impoundment Control Act Congress sought to control two forms of impoundments: deferrals and rescissions. Deferrals refer to spending delays over the course of a fiscal year, while rescissions identify determinations permanently to withhold appropriated funds. *Id.*, §§ 1011–1013, 88 Stat. 333–35. Congress authorized Executive deferrals, upon reporting to Congress and subject to legislative veto. *Id.*, § 1013, 88 Stat. 334–35. Congress permitted the President only to propose rescissions, to be effective only upon enactment, using special expedited procedures, of a rescission law. *Id.*, § 1017, 88 Stat. 337–39. Unless Congress affirmatively approved the rescission, the President was obliged to release the funds. *Id.*, § 1012(b), 88 Stat. 334.

After invalidation of the legislative veto, *INS v. Chadha*, 462 U.S. 919 (1983), the Executive began to use deferrals aggressively on the view that severance of the

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[14] *See, e.g., State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1109–14 (8th Cir. 1973); *Pennsylvania v. Weinberger*, 367 F. Supp. 1378, 1381–82 (D.D.C. 1973); *Pealo v. Farmers Home Admin.*, 361 F. Supp. 1320, 1323–24 (D.D.C. 1973); *Minnesota v. Weinberger*, 359 F. Supp. 789, 791 (D. Minn. 1973); *Local 2677, A.F.G.E. v. Phillips*, 358 F. Supp. 60, 75–79 (D.D.C. 1973).

legislative veto from the Impoundment Control Act left the President with expanded deferral authority, subject to disapproval only through Congress's enactment of a new law. The District of Columbia Circuit rejected this view and struck the entire deferral mechanism, holding that the legislative veto provision could not be severed from the deferral authority. *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987). Congress then amended the Impoundment Control Act to narrow the Executive's deferral authority, in light of the loss of control previously provided by the legislative veto, to those purposes permitted by the Antideficiency Act. Pub. L. No. 100–119, § 206, 101 Stat. 754, 785–86 (1987). As amended, the Impoundment Control Act now authorizes deferrals only "to provide for contingencies," "to achieve savings made possible by or through changes in requirements or greater efficiency of operations," or as otherwise provided by law, and allows the Executive only to propose rescissions. 2 U.S.C. § 684(b) (1994).

E. For Over a Decade, Congress Has Delegated Particular Authority Over Spending to Achieve Deficit Reduction

Ballooning federal deficits in the 1980s led Congress to fashion further tools to control spending. In 1985, Congress enacted the Gramm-Rudman-Hollings Act, authorizing the President to issue a "sequestration" order canceling, pro rata, appropriations for a broad range of specified programs, as necessary to meet mandated annual deficit targets. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99–177, tit. II, § 252, 99 Stat. 1038, 1072–78. After this Court invalidated the Comptroller General's role in administering sequestration, *Bowsher v. Synar*, 478 U.S. 714 (1986), Congress amended the Act to delegate the sequestration function exclusively to the Executive. Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100–119, tit. I, § 102, 101 Stat. 754, 754–75. When the deficit targets proved difficult to achieve, Congress again

amended the Act to replace the fixed targets with prospective annual spending limits and revenue-neutrality requirements, to be enforced through Executive sequestration. Budget Enforcement Act of 1990, Pub. L. No. 101–508, tit. XIII, §§ 13101, 13111, 104 Stat. 1388–573, 1388–574 to 1388–602.

As large deficits persisted, Congress began considering measures to augment the existing rescission and sequestration regimens. One of these proposals, called "expedited rescission," was to amend the Impoundment Control Act to streamline the process for Congress to approve rescissions proposed by the President. *See, e.g.*, H.R. 2164, 102d Cong. (1991). An alternative proposal, termed "enhanced rescission," was to make Executive rescissions automatic in defined circumstances, subject to congressional disapproval. *See, e.g.*, S. 206, 104th Cong. (1995); H.R. 78, 102d Cong. (1991). Other proposals included amending the Constitution to give the President a line-item veto, *see, e.g.*, H.J. Res. 6, 104th Cong. (1995); H.J. Res. 4, 103d Cong. (1993), or adopting a congressional procedure for presenting each spending provision to the President as a separate bill, for approval or veto, *see, e.g.*, S. 137, 104th Cong. (1995); S. 238, 104th Cong. (1995).

Although these latter, more sweeping proposals did not gain a majority, support for amending the Impoundment Control Act grew, until in the Line Item Veto Act of 1996 Congress determined to give the President "enhanced rescission" authority. Having learned from this Court in *Chadha* and *Bowsher* that Congress cannot reserve any role for itself in executing the laws, Congress delegated all authority to implement the Act to the President, by giving the President circumscribed discretion to cancel spending during a five-day period.

II. THE LINE ITEM VETO ACT IS A CONSTITUTIONAL EXERCISE OF THE APPROPRIATION POWER

Congress's delegation to the President of limited authority to cancel the effect of discrete spending and reve-

nue provisions is consistent with the lawmaking requirements of Article I and the constitutional separation of powers, as expressed in the doctrine against undue delegation.

A. The Line Item Veto Act Conforms With Article I

The Line Item Veto Act respects the lawmaking requirements of Article I. "Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *Chadha,* 462 U.S. at 945. Article I, section 7, prescribes the two fundamental requisites for legislative action: "bicameral passage followed by presentment to the President." *Id.* at 954–55. These requirements "serve essential constitutional functions" and "represent[ ] the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.* at 951.

The Line Item Veto Act fully follows this procedure. The Act itself, obviously, was agreed to by both Houses and the President. Further, the Act applies only to laws that have themselves been enacted in compliance with Article I, section 7, for the President's cancellation authority arises only "with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution." ICA § 1021(a) (2 U.S.C. § 691(a)); App. App. at 32a. Thus, the Act does not alter or enlarge the President's "limited and qualified power to nullify proposed legislation by veto," *Chadha,* 462 U.S. at 947, which, as always, must be exercised with regard to an entire law or not at all. Indeed, by restricting the cancellation authority to provisions that the President has "signed into law," Congress has prevented the President from using the Act to supplement the veto power.

Despite the Act's adherence to Article I's "[e]xplicit and unambiguous provisions," *id.* at 945, appellees contend that the Act violates Article I by giving the President unilateral power, following enactment, in effect to repeal

laws.[15] This Court has established that executive authority to alter the force of laws poses no violation under Article I. In *Chadha* the Court considered the similar argument that permitting the Executive to exercise delegated authority, there under the Immigration and Nationality Act, "will sanction 'lawmaking by the Attorney General. * * * Why is the Attorney General exempt from submitting his proposed changes in the law to the full bicameral process?'" 462 U.S. at 953 n.16 (quoting petitioner's brief; omission in original). While noting that "some administrative agency action—rulemaking, for example—may resemble 'lawmaking,'" the Court held, "Executive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require." *Id.* "The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7." *Id.*

Similarly, any use of the President's cancellation authority under the Line Item Veto Act will occur not as an exercise of legislative power, but in fulfillment of the President's Article II duty to execute the laws. "When the Executive acts, he presumptively acts in an executive or administrative capacity as defined in Art. II." *Id.* at 951 (citation omitted). Once the President signs into law a spending or revenue bill subject to the Line Item Veto Act, he has no more lawmaking responsibilities regarding that legislation. The legislative process is complete, for "a bill when so signed becomes from that moment a law." *La*

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[15] The short title of the "Line Item Veto Act" provides no support for this argument. While "the title of a statute or section can aid in resolving an ambiguity in the legislation's text," *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189 (1991), titles and headings do not control over statutory text and "cannot undo or limit that which the text makes plain." *Brotherhood of Railroad Trainmen v. Baltimore & O.R.R.*, 331 U.S. 519, 529 (1947).

Abra Silver Mining Co. v. United States, 175 U.S. 423, 454 (1899).

From that moment, the President has an Article II duty to execute both the law subject to the Act and the Act itself. The constitutional value underlying the Presentment Clause, that all participants in the lawmaking process agree to precisely the same statutory text, has been achieved: The President's executive authority "cannot reach beyond the limits of the [Line Item Veto Act] that created it—a statute duly enacted," *Chadha*, 462 U.S. at 953 n.16, to which all lawmaking participants agreed. When Congress presents, and the President approves, a bill covered by the Act, all three actors will also have agreed that each spending and revenue item in the bill is to be subject to executive cancellation, within the limits of the Act. Therefore, the President's post-enactment exercise of authority to cancel these items does not implicate the "finely wrought" procedure of Article I. *Cf. Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 221 (1989) (Article I's Origination Clause "implies nothing about the scope of Congress' power to delegate discretionary authority under its taxing power once a tax bill has been properly enacted"). [16]

[16] The Act's precise operation reinforces the conclusion that it does not violate Article I, as the manner in which the President exercises the cancellation authority differentiates this delegation from lawmaking. Under the Presentment Clause, if the President does not approve a bill, "he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." Art. I, § 7, cl. 2. In contrast, under the Line Item Veto Act, the President sends both Houses a "special message," which is printed not in a congressional Journal but in the Federal Register, where administrative actions are recorded. ICA § 1022(c)(2) (2 U.S.C. § 691a(c)(2)); App. App. at 36a. If either House wishes to disapprove one or more presidential cancellations, it does so not by the originating House's reconsidering the original bill disapproved by the President, as required when overriding a presidential veto, but by considering a fresh bill, in full compliance with Article I, section 7. ICA § 1025 (2 U.S.C. § 691d); App. App. at 39a–47a.

Nor does the requirement that the President exercise his cancellation authority within five days of signing the underlying spending or revenue bill, ICA § 1021(a)(B) (2 U.S.C. § 691(a)(B)); App. App. at 33a, alter this conclusion or suggest that Congress was seeking to enhance the President's veto power. In fact, the five-day limit serves a different and worthy end. Because spending cancellations are limited to total rescission, any potential of a cancellation's occurring after the beginning of a fiscal year would render agencies legally unable to obligate any appropriated funds at the beginning of the year. Otherwise, if any of their spending items came to be canceled, agencies would have already spent some portion of the appropriated, but now rescinded, funds, thereby violating the Antideficiency Act. Moreover, any presidential cancellation will necessarily introduce a period of uncertainty whether Congress will invoke the procedures under the Act to disapprove any of the cancellations. In that interval, agencies whose appropriations are affected by cancellations, along with their employees, beneficiaries, and contractors, and, in the case of revenue provisions, affected taxpayers, will be burdened by that uncertainty. To avoid "unnecessarily prolong[ing] the process," H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 22 (1996), while still giving the President adequate time to make the Act's required determinations, Congress prudently limited cancellation to the five days after enactment.

B. The Line Item Veto Act Assigns Delegable Responsibility to the President

The constitutional principle that ensures that a delegation to the Executive respects the separation of powers is not Article I, but the doctrine against undue delegation. As the Court explained in *Chadha,* after rejecting the claim that the Executive was performing legislative functions in violation of Article I, "[t]he constitutionality of the Attorney General's execution of the authority delegated to him by [statute] involves only a question of delegation doctrine." 462 U.S. at 953 n.16.

That the Line Item Veto Act delegates authority over taxation and spending does not alter the applicability of the delegation doctrine. In *Mid-America Pipeline,* the Court noted the long constitutional pedigree of delegations of taxing authority, 490 U.S. at 221–22 (citing *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394 (1928), and *Field v. Clark,* 143 U.S. 649, 683–89 (1892)), and affirmed "that the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges." *Id.* at 223. Spending authority is equally subject to delegation. This Court has never held "*any* legislative power, much less that over appropriations, to be nondelegable due to its 'core function' status," and "[n]o constitutional provision distinguishes between 'core' and 'non-core' legislative functions." *Synar v. United States,* 626 F. Supp. 1374, 1385 (D.D.C.) (three-judge court) (per curiam), *aff'd on other grounds sub nom. Bowsher v. Synar,* 478 U.S. 714 (1986); *see Loving v. United States,* 116 S. Ct. 1737, 1748 (1996).

The only constitutional restriction unique to Congress's "power of the purse" is the Appropriations Clause, art. I, § 9, cl. 7, which "'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *OPM v. Richmond,* 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States,* 301 U.S. 308, 321 (1937)). Because the Clause "was intended as a restriction upon the disbursing authority of the Executive department," it "is without significance" when Congress has legislated spending discretion. *Cincinnati Soap,* 301 U.S. at 321; *accord* Joseph Story, 2 *Commentaries on the Constitution of the United States* § 922 (Fred B. Rothman & Co. 1991) (1833) ("clause is a limitation, not upon the powers of congress, but upon the acts of the executive"). The Court accordingly has recognized Congress's power to appropriate funds without specifying "the particular uses to which the appropriated money is to be put":

> That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. . . . The constitutionality of this delegation of authority has never been seriously questioned. [17]

The Line Item Veto Act fully complies with the Appropriations Clause, because Congress continues to appropriate every penny available for spending. The President has discretion only to *decline* to spend funds that Congress *has* appropriated, not to *spend* funds that Congress has *declined* to appropriate.

This delegation of authority in the Line Item Veto Act not to spend appropriated funds is not novel. As described in Point I, Congress has delegated discretion to the Executive to decline to spend appropriated funds since its first appropriations under the Constitution. The Justice Department has concurred that "Congress could provide in its appropriation that the money need not be spent. Or it could enact an appropriation, and then provide in contemporaneous or subsequent legislation that the money need not be spent. . . ." OLC Memo., *supra* n.12, at 282. In construing the appropriation power:

> A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to

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[17] *Cincinnati Soap*, 301 U.S. at 321–22. Recognition of Congress's authority to give the Executive discretion through lump-sum appropriations traces from the earliest period under the Constitution, *see* 3 Annals of Cong. 889–90 (1793), to the present, *see Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). For example, in 1937 Congress appropriated $1.5 billion (in addition to unexpended prior balances), roughly one-fifth of the entire federal budget at the time, "to be used in the discretion . . . of the President" for a variety of domestic projects. Emergency Relief Appropriation Act of 1937, ch. 401, tit. I, § 1, 50 Stat. 352, 353.

> be found in the origin and history of the power involved, or in its nature, or in both combined.

Cincinnati Soap, 301 U.S. at 315 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327–28 (1936)).

Despite this long accepted history of permissive appropriations, the district court held that Congress had not "conferred a delegable power" in the Line Item Veto Act, but had "ceded basic legislative authority." App. App. at 24a. The court found that "[c]ancellation under the Act is simply not the same thing as impoundment, or any other suspension of a statutory provision," but "is equivalent to repeal." App. App. at 24a–25a. "Never before," according to the district court, has a congressional delegation "gone so far as to transfer the function of repealing a provision of statutory law." App. App. at 25a.

Contrary to the district court's understanding, Congress has long authorized Executive action altering the force of enacted laws, including taxing and spending laws. This Court's approval of such delegations dates at least to 1813, when the Court upheld the President's exercise of delegated authority to "revive[]" a law restricting foreign commerce, which by its terms had expired, so that it would again "have full force and effect." *The Brig Aurora*, 11 U.S. (7 Cranch) 382, 384, 388 (1813).

Describing the *Brig Aurora* decision for the Court in 1892, Justice Harlan noted that, faced with a claim "that Congress could not transfer legislative power to the President," the Court had "deci[ded] that it was competent for Congress to make the revival of an act depend upon the proclamation of the President." *Field v. Clark*, 143 U.S. at 682-83. Justice Harlan traced Congress's delegation of authority to trigger statutory repeals of tax provisions to 1815, when Congress authorized repeal of laws imposing import duties, "[s]uch repeal to take effect in favour of any foreign nation, whenever the President" determines that that nation's duties have been abolished. Act of Mar. 3, 1815, ch. 77, 3 Stat. 224, *cited in Field v. Clark*, 143 U.S. at 685. As Justice Harlan observed, President Mon-

roe used this authority to issue several proclamations, which were printed in the United States Statutes at Large, declaring that those statutory provisions "are repealed" with respect to imports of particular origin. 3 Stat. app. 1, procl. 3–7 (1818–21), *cited in* 143 U.S. at 686.

Justice Harlan also cited a law dating from 1830 providing that Acts of Congress imposing duties on foreign vessels "shall be repealed: *Provided,* That the President" found that the foreign nation's duties had been abolished. Act of May 31, 1830, ch. 219, § 2, 4 Stat. 425, *cited in* 143 U.S. at 687. These legislative precedents giving the President authority to alter the force and effect of tax laws, "from the organization of the government to the present time," are "entitled to great weight." 143 U.S. at 683.

Congress has given the President similar authority to nullify spending provisions. In the 1960s Congress authorized the President to reduce federal spending several billion dollars below appropriated levels through rescission. *See supra* p. 12. Further, the Gramm-Rudman-Hollings Act authorized the President "permanently [to] cancel[]" a portion of all covered appropriations. Pub. L. No. 99–177, § 252(a)(4), 99 Stat. 1074; *see supra* p. 16. In *Synar v. United States,* the three-judge district court "disagree[d]" with the plaintiffs' claim that the delegation was *"per se* invalid because it allows administrators to 'nullify' or 'override' laws":

> The Supreme Court previously has upheld delegations which permit officials to determine when, if ever, a law should take effect. . . . In such cases, the Court classifies Congress' action as legislating in contingency. . . . Viewed in this context, the authority delegated by the Act does not differ in kind from that approved in prior cases.

626 F. Supp. at 1387.

Nor are statutory delegations to override provisions of law unique to taxation and spending. In the Rules Enabling Acts, for example, Congress delegated to this Court authority to promulgate rules of practice and procedure

for civil proceedings (and formerly for criminal proceedings) in the lower courts and provided that "[a]ll laws in conflict with such rules shall be of no further force or effect." 28 U.S.C. §2072(b) (1994) (civil); 18 U.S.C. §3771 (1982) (repealed) (criminal); *see Sibbach v. Wilson & Co.*, 312 U.S. 1, 7–10 (1941); *Davis v. United States*, 411 U.S. 233, 241 (1973) ("force of §3771" is that "prior inconsistent statute [is] deemed to have been repealed").

As in each of these prior cases, Executive action pursuant to the Line Item Veto Act fulfills, rather than nullifies, Congress's will. Because Congress has expressly legislated that each spending provision enacted over the life of the Act (unless exempted from the Act) be permissive and subject to cancellation within the limits of the Act, a presidential decision not to spend a permissive appropriation in accord with this delegated statutory authority simply does not nullify Congress's legislated will.

C. The Line Item Veto Act Comports With the Doctrine Against Undue Delegation

The Line Item Veto Act is a constitutional delegation that serves the separation of powers through "measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes." *Loving*, 116 S. Ct. at 1751. Congress's delegation is "'constitutionally sufficient,"' as Congress has "'clearly delineate[d] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). Based upon its judgment about the serious economic threat that persistent budget deficits pose to the Nation, Congress has determined to make all spending and tax provisions covered by the Act permissive for five days from their enactment. In establishing deficit reduction as its paramount objective, Congress has fulfilled "[t]he essentials of the legislative function," *Yakus v. United States*, 321 U.S. 414, 424 (1944), by "'lay[ing] down by legislative act an intelligible principle'" to guide the President's discretion.

Mistretta, 488 U.S. at 272 (quoting *J.W. Hampton*, 276 U.S. at 409).

The determinations, assessments, estimates, and considerations that Congress directed be part of the President's cancellation decisions under the Act provide a robust context guiding his exercise of discretion. To cancel spending or tax benefits, the President must determine, and report to Congress, that the cancellation will reduce the federal budget deficit, not impair any essential government functions, and not harm the national interest. ICA § 1021(a) (2 U.S.C. § 691(a)); App. App. at 33a. The President's cancellation message must provide "supporting material," explain "the reasons for the cancellation," estimate the "fiscal, economic, and budgetary effect," describe "all facts, circumstances and considerations relating to or bearing upon the cancellation," estimate the effect on the "objects, purposes and programs" affected, and identify "the specific States and congressional districts, if any, affected." ICA § 1022(b) (2 U.S.C. § 691a(b)); App. App. at 34a–35a. The President must "consider the legislative history, construction, and purposes of the law" subject to cancellation and "any specific sources of information referenced in such law or, in the absence of specific sources of information, the best available information." ICA § 1021(b) (2 U.S.C. § 691(b)); App. App. at 33a.

Key statutory features further confine the President's discretion. The Act constrains the President's cancellation authority to the five days after a measure is enacted, rather than throughout the year. The fact that the cancellation authority is one-time-only also limits the President's discretion, as the President may not cancel funding, only to restore it later. Significantly, the President's cancellation authority is limited to total rescission. The President is thus put to the difficult choice of canceling a spending or tax item entirely or not at all. This "all or nothing" requirement, H.R. Conf. Rep. No. 104–491, at 32, 33, gives the President far less discretion than a general grant of authority to reduce expenditures to any level he sees fit.

Further, Congress made a number of controlling legislative judgments. Congress exempted two-thirds of the budget from the reach of presidential discretion by excluding all current levels of entitlement programs from cancellation. ICA §§ 1021(a)(2), 1026(5), (8) (2 U.S.C. §§ 691(a)(2), 691e(5), (8)); App. App. at 32a, 49a, 51a. Congress also limited the President to cancellation of appropriation dollar amounts, not substantive provisions. *See* ICA § 1026(4)(A) (2 U.S.C. § 691e(4)(A)); App. App. at 48a. By barring cancellation of "fencing language" or other substantive provisions, Congress ensured "that the President cannot use this authority to modify or alter any aspect of the underlying law." H.R. Conf. Rep. No. 104–491, at 20. Finally, to ensure that the authority can be used to advance only its legislative purpose of deficit reduction, Congress enacted an intricate "lockbox" mechanism, ICA § 1024 (2 U.S.C. § 691c); App. App. at 37a–39a,

> to maintain a system of checks and balances in the President's use of the cancellation authority. Any credit for money not spent, or for revenue foregone, is dedicated to deficit reduction . . . . This ensures that the President does not simply cancel . . . in order to increase spending in other areas.[18]

Notwithstanding the substantial legislative judgments and standards embodied in the Act, appellees have pointed to several attributes of the Act to seek to differentiate it from prior delegations. They have noted that the cancellation authority may be exercised immediately, without any intervening changes in circumstances; that, once exercised, it is irreversible; that its exercise is not mandatory; and that the President may use the authority to im-

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[18] H.R. Conf. Rep. No. 104–491, at 20–21. In addition, Congress retains ultimate control over all appropriation and revenue decisions. Because the Act applies only to laws enacted after January 1, 1997, and sunsets on December 31, 2004, 2 U.S.C. § 691 note, App. App. at 58a–59a, with each spending or tax measure enacted over the next eight years, Congress retains the power to make a fresh decision whether or not to make that measure subject to the Act. Each time Congress makes the legislative judgment to let the Act apply, it chooses to make the individual items in that law permissive.

plement his policy choices. This Court's substantial delegation jurisprudence identifies none of these features as injurious to the constitutional legitimacy of a delegation.

The Line Item Veto Act is not the first delegation with these attributes. With regard to appellees' assertion that prior delegations depended upon the passage of a significant interval before their use, during which changes in circumstances necessitating administrative action might occur, one of the most important delegations of contemporary times, the power conferred on President Nixon to impose wage-price controls, depended on neither an interval of time nor a change in circumstances. A three-judge district court in the District of Columbia upheld Congress's delegation of discretion to impose wage-price controls, despite the fact that the delegated authority became effective immediately upon enactment, was based on already-prevailing economic conditions, was to expire in six months, and was extended for periods of as short as two months, to ensure that Congress could keep "close control." *See Amalgamated Meat Cutters v. Connally,* 337 F. Supp. 737, 754 & n.30 (D.D.C. 1971) (three-judge court), *cited with approval in Eastlake v. Forest City Enterprises,* 426 U.S. 668, 675 (1976).

Nor is the irreversible nature of a cancellation under the Act unique. Each of the statutes authorizing the Executive to nullify or repeal tax or spending provisions cited in Point IIB, *see supra* pp. 24–25, from the 1815 law authorizing President Monroe to repeal import duties relied upon by Justice Harlan in *Field v. Clark,* 143 U.S. at 685, to the Gramm-Rudman-Hollings sequestration authority upheld by the three-judge district court in *Synar,* 626 F. Supp. at 1377, delegated similarly irreversible or permanent authority. Moreover, as noted above, that cancellation authority is irreversible operates as a limit, not an expansion, on the delegation.

Finally, that the President has discretion whether to exercise cancellation authority, and that he may use that authority to further policy goals of his Administration, do not distinguish the Line Item Veto Act from prior delega-

tions, nor suggest any constitutional defect. To note just one example, the sweeping authority upheld in *Amalgamated Meat Cutters* "'to issue such orders and regulations as [the President] may deem appropriate to stabilize prices, rents, wages and salaries'"[19] neither compelled the President to impose wage or price controls nor precluded the President from using the authority to further economic goals he supported.

As the Court has recently reaffirmed, "'Congress is not confined to that method of executing its policy which involves the least possible delegation,'" *Mistretta,* 488 U.S. at 379 (quoting *Yakus,* 321 U.S. at 425–26), and it is no indictment of a law like the Line Item Veto Act that Congress has delegated "authority that it could exercise itself," *Loving,* 116 S. Ct. at 1744 (citing *Wayman v. Southard,* 23 U.S. (10 Wheat.) 1, 42 (1825)). The Court should uphold the delegation of Executive authority in the Line Item Veto Act, because the Act meets the standards this Court applies to safeguard the separation of powers.

CONCLUSION

The Court should reverse the judgment of the district court.

Respectfully submitted,

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[19] 337 F. Supp. at 745 (quoting Economic Stabilization Act of 1970, Pub. L. No. 91–379, tit. II, § 202, 84 Stat. 799, 799–800).

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IN THE
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OCTOBER TERM, 1996

FRANKLIN D. RAINES, *et al.*,

Appellants,

v.

SENATOR ROBERT C. BYRD, *et al.*,

Appellees.

On Direct Appeal from the United States
District Court for the District of Columbia

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether the Line Item Veto Act violates Article I of the Constitution by delegating legislative authority to the President.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. THE DISTRICT COURT'S REASONING WOULD EVISCERATE THIS COURT'S NONDELEGATION DOCTRINE IN THE REGULATORY CONTEXT 3

II. REPRESENTATIVE DEMOCRACY DEMANDS ACCOUNTABILITY OF THE LEGISLATIVE BRANCH TO THE PEOPLE..... 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Page

Arizona v. California, 373 U.S. 546, 626 (1963) 8

Bowsher v. Synar, 478 U.S. 714, 730 (1986) 8

Byrd v. Raines Slip op., Civ. No. 97-0001 (D.C. D.C. April 10, 1997) 4, 8

City of Rome v. United States, 446 U.S. 156, 207 (1980) 7-8

J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) 6

Loving v. United States, 517 U.S.___, 116 S. Ct. 1737, 1743, 1750 (1996) 4, 5, 6

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Airport Noise, Inc., 501 U.S. 252, 273 (1991) 8

Miller v. Johnson, 515 U.S.___, 115 S. Ct. 2475, 2491 (1995) 7

Mistretta v. United States, 488 U.S. 361, 371-3 (1989) 6

United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 1639-40 (1995) 7

Statutes

Page

The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996) ..... passim

Miscellaneous

Ely, John H., DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, (1980) 6

Hamilton, Marci A., THE FIRST AMENDMENT'S CHALLENGE FUNCTION AND THE CONFUSION IN THE SUPREME COURT'S CONTEMPORARY FREE EXERCISE JURISPRUDENCE, 29 Ga. L. Rev. 81, 86-90 (1994) 8

Schoenbrod, David, GOALS STATUTES OR RULES STATUTES: THE CASE OF THE CLEAN AIR ACT, 30 UCLA Law Review 740 (1983) 7

Schoenbrod, David, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION, (1993) at 28-31 8

S. Rep. No. 9, 104th Cong., 1st Sess., at 15 (1995) 6

I

INTEREST OF AMICUS CURIAE[1]

The American Petroleum Institute ("API"), a non-profit corporation in the District of Columbia, is a national trade association. More than 300 companies are members and represent all facets of the petroleum industry, including exploration, production, transportation, refining and marketing. As such, they are often subject to and required to comply with onerous federal regulations which are created by federal agencies under statutes that delegate lawmaking authority under vague terms. In API's view, such statutes impermissibly delegate to these agencies the Congress' exclusive authority under the Constitution to legislate. API's members therefore have a vital interest in this Court's preservation of the nondelegation doctrine as it applies to improper regulatory excesses which are inherently legislative in nature.

The Parties have consented in writing to the filing of this brief.

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[1]Pursuant to Supreme Court Rule 37.6, *amicus curiae* hereby represents that no counsel for any party had any role in authoring this brief. *Amicus curiae* discloses that Professors of Law Marci A. Hamilton and David Schoenbrod, of The Cardozo School of Law and New York Law School, respectively, assisted in the preparation of this brief, for which they will receive compensation.

SUMMARY OF ARGUMENT

The Line Item Veto Act raises a constitutional question of first impression on which the *amicus curiae* does not take a position. Rather, this brief is being filed as a corrective to the seriously flawed reasoning of the district court, which would invalidate the Line Item Veto Act under this Court's nondelegation doctrine, but permit "vast" delegation of legislative authority to unelected federal agencies. *Amicus curiae* firmly believes that the practice of delegation of lawmaking authority to agencies is a serious threat to our constitutional order. Any opinion of this Court which followed the district court's reasoning would cause serious harm to the liberty-preserving structure of the Constitution.

The nondelegation doctrine is integral to the Constitution's purpose of protecting liberty. If embraced by this Court, the district court's reasoning would undermine legislative accountability and therefore the very power of the people to check the overreaching actions of their government.

This brief explains the errors of the district court's interpretation of the nondelegation doctrine and provides an overview of the constitutional significance of the nondelegation doctrine.

ARGUMENT

I. THE DISTRICT COURT'S REASONING WOULD EVISCERATE THIS COURT'S NONDELEGATION DOCTRINE IN THE REGULATORY CONTEXT

Amicus curiae does not take a position on the Line Item Veto Act's constitutionality.[2] The constitutionality of the Act is an issue of first impression that does not directly affect the interests of *amicus curiae*. Rather, this brief is being filed for the purpose of placing the district court's reasoning regarding delegation in constitutional perspective.

Of primary concern to *amicus curiae* is the district court's reasoning regarding congressional delegation of lawmaking authority. If affirmed by this Court, the district court's interpretation of the nondelegation doctrine would (1) erase much of this Court's nondelegation doctrine in the regulatory context and (2) place the Court's imprimatur on massive delegations of Congress' constitutionally appointed lawmaking authority to unelected and unaccountable agencies. What the district court says of the Line Item Veto Act applies at least as much to Congress' persistent delegation of lawmaking authority to unaccountable and unelected agencies who "make law" simply by publishing rules in the *Federal Register*.

While the Line Item Veto Act *may* be an example of Congress avoiding its difficult lawmaking responsibilities, the widespread practice of delegating substantial policy decisions to federal agency lawmaking certainly is. The district court characterized the Act as follows:

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[2] Nor does *amicus curiae* take a position on the standing and ripeness issues presented in this case.

> The Line Item Veto Act * * * hands off to the President authority over fundamental legislative choices. Indeed, that is its reason for being. It spares Congress the burden of making those vexing choices of which programs to preserve and which to cut. *Byrd v. Raines, slip op. 34-35, Civ. No. 97-0001 (D.C. April 10, 1997).*

On the district court's own reasoning, delegation to agencies violates the Constitution far more obviously than does the Line Item Veto Act.

Unfortunately and illogically, the district court erroneously narrowed application of the nondelegation doctrine in the regulatory context:

> It has long been held that Congress may -- indeed, of necessity, must -- delegate vast authority to the Executive Branch of government to make and to change rules for the governance of national affairs, so long as they are in furtherance of the will of Congress. *Id.* at 29.

The district court seems to assume that agency delegation is shielded from constitutional scrutiny while delegation to the President himself is not. Yet, delegation to agencies is no less constitutionally suspect. *Amicus curiae* specifically challenges the view that the power to "make and change rules for the governance of national affairs" "may" or "must" be delegated to the Executive Branch. Instead, in its last term, this Court held:

> The intelligible principle rule seeks to enforce the understanding that Congress may not

> delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes. *Loving v. United States*, 517 U.S. ___, 116 S. Ct. 1737, 1750 (1996).

The district court's erroneous reasoning has its roots in the expansive interpretation of Congress' power to delegate lawmaking to the Executive Branch found in the government's brief below. *See* Memorandum of Points and Authorities in Support of Defendants' Alternative Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 19-23. Interestingly, the Senators and Representatives challenging the Act did not focus the district court's attention upon this Court's nondelegation doctrine prohibiting the abdication of lawmaking responsibility, but rather took a more formalistic approach under Article I. Indeed, neither party's brief illuminated the lurking delegation problems that lay in the path of the district court's decision. Hence, the necessity of this *amicus curiae* brief at this stage.

The district court's logic is unpersuasive. It is not true that courts must be more tolerant when Congress delegates the power to make laws or authorizes expenditures than when it delegates the power to repeal laws or expenditures. The Framers crafted Article I, in fact, to make it more difficult for government to act by requiring that new laws and new expenditures be passed only after the House, Senate, and the President take responsibility for them. Under the district court's reasoning, however, such accountability is only necessary to stop regulation and spending, but not to initiate it. The district court's reasoning simply turns the nondelegation doctrine on its head. If the Line Item Veto Act distorts the Framers' deliberately chosen scheme of lawmaking, then the practice of delegating legislative prerogatives to unaccountable

and unelected agencies surely does so as well. Thus, regardless of whether the lower court reached the correct result in this case[3], its stated reasoning contravenes the reasonable application of this Court's "intelligible principle" rule in many other instances. *See Mistretta v. United States,* 488 U.S. 361, 371-3 (1989) *citing J. W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); *see also Loving v. United States*, 517 U.S.___, 116 S. Ct. 1737, 1743 (1996). Were this Court to embrace the district court's reasoning, it would seriously undermine the Framers' intent to require elected legislators to take responsibility for the laws that government imposes.

II. REPRESENTATIVE DEMOCRACY DEMANDS ACCOUNTABILITY OF THE LEGISLATIVE BRANCH TO THE PEOPLE

Liberty is possible only in a representative democracy where the legislators are directly accountable to the electorate. Congress must be prevented from deflecting its unique responsibility to make the country's hard policy choices -- through legislation -- if the "democracy" half of representative democracy is not to become a charade. As Professor John Ely has stated, "There can be little point in worrying about the distribution of the franchise and other personal political rights unless the important policy choices are made by elected officials." DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) at 133.

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[3]If the Line Item Veto Act is unconstitutional, there may still be constitutional means to achieve the same end. For example, the expedited rescission proposal rejected by Congress. S. Rep. No. 9, 104th Cong., 1st Sess., at 15 (1995) (referring to S. 14). *Amicus curiae* does not take a position on the possibility that Congress might achieve the objectives of the Act (were the Act held unconstitutional) through lawmaking regarding the impoundment power.

Without the Constitution's accountability mechanism, elected officials naturally would be tempted to evade accountability. As John Adams put it in 1776, "As a good government is an empire of laws, the first question is, how shall the laws be made." Too often, legislative instructions from Congress to agencies typically amount to mere generalized recitations of competing and conflicting policy objectives, without *any* guidance as to how they should be reconciled -- for example, the environment should be made clean but without a loss of jobs. Schoenbrod, GOALS STATUTES OR RULES STATUTES: THE CASE OF THE CLEAN AIR ACT, 30 UCLA L. Rev. 740 (1983). When constituents complain to Congress about regulations that are allegedly too weak or too strong, legislators blame the agency; the regulations themselves rarely come up for a vote in Congress. Our elected lawmakers may thus cast themselves as heroes and their own creations -- the regulatory agencies -- as scapegoats. The broad delegation of legislative authority to federal agencies is ersatz democracy.

The Constitution requires this Court to leave the nation's policy choices to Congress. However, this Court holds the constitutional obligation to invalidate those laws that are the result of the Congress' abdication of its appointed constitutional role. *See United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 1639-40 (1995) (Kennedy, J., concurring); *Miller v. Johnson*, 515 U.S.___, 115 S. Ct. 2475, 2491 (1995). In Justice Rehnquist's words,

> While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government . . ., it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities.

City of Rome v. United States, 446 U.S. 156, 207 (Rehnquist, J., dissenting). That role is integral to the preservation of liberty when this Court is asked to consider whether the structure of the Constitution has been violated. "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). As the court below noted, this Court has " 'not hesitated to invalidate provisions of law which violate [the separation of powers.]' " *Byrd v. Raines*, slip op. at 21 (*quoting Metropolitan Washington Airports Authority v. Citizens for the Abatement of Airport Noise, Inc.*, 501 U.S. 252, 273 (1991).

Both democratic accountability and liberty are undercut when Congress does not take affirmative responsibility for making laws. The nondelegation doctrine protects democratic accountability and therefore liberty. *See Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., concurring). This fundamental means of protecting liberty antedates, undergirds, and complements the protection of rights later enumerated in the Bill of Rights. David Schoenbrod, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION at 28-31 (1993); Marci A. Hamilton, THE FIRST AMENDMENT'S CHALLENGE FUNCTION AND THE CONFUSION IN THE SUPREME COURT'S CONTEMPORARY FREE EXERCISE JURISPRUDENCE, 29 Ga. L. Rev. 81, 86-90 (1994).

CONCLUSION

This Court is rightly reluctant to interfere with legislative outcomes and especially social policy choices. There should be no similar reluctance, however, to alert Congress of its non-delegable role to make those choices, by invalidating those laws in which Congress has abdicated its constitutionally designated lawmaking responsibility. Accordingly, we urge the Court to reject the district court's expansive reading of Congress' power to delegate lawmaking power to agencies and to craft a rule against delegation that ensures accountability and preserves liberty.

Respectfully submitted,

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